

Michigan Law Review

Volume 101 | Issue 4

2003

Should We All Be Welfare Economists?

Richard H. Fallon Jr.
Harvard Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Law and Economics Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Richard H. Fallon Jr., *Should We All Be Welfare Economists?*, 101 MICH. L. REV. 979 (2003).
Available at: <https://repository.law.umich.edu/mlr/vol101/iss4/5>

This Essay is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

SHOULD WE ALL BE WELFARE ECONOMISTS?

*Richard H. Fallon, Jr.**

INTRODUCTION

On what normative foundation should the edifice of law and public policy be built? What are proper grounds for claims of individual right, and how, generally, do those grounds relate to considerations of individual well-being and social welfare?

In this Essay, I argue that individual well-being and a related concept of social welfare should be important considerations in the design of legal rules, but not the exclusive ones. When the notion of well-being receives substantive content, the most plausible and attractive definitions all allow a distinction between what will best promote a person's well-being and what that person might rationally judge to be most choice-worthy,¹ typically in light of a moral or aesthetic ideal. This distinction is important. Once it is recognized that the greatest possible well-being is not what everyone necessarily values most, the notion that public policy should be based exclusively on social welfare — defined as an increasing function of the well-being of individuals — loses plausibility. It becomes important to explore the relationship between well-being and other values and to ask what else people might rationally value,² sometimes more than their own well-being, and why. In the answers to these questions lie the foundations of rights.

* Professor of Law, Harvard Law School. B.A. 1975, J.D. 1980, Yale. — Ed. I am grateful to a number of friends and colleagues who have commented on previous drafts, including Scott Brewer, Allen Ferrell, Christine Jolls, Greg Keating, Howell Jackson, Louis Kaplow, Dan Meltzer, Frank Michelman, Fred Schauer, Steve Shavell, and Bill Stuntz, as well as participants in a workshop at the University of Pennsylvania Law School. Mark Freeman and Kevin Walsh provided valuable research assistance.

1. See Thomas M. Scanlon, Jr., *The Status of Well-Being*, in 19 THE TANNER LECTURES ON HUMAN VALUES 93, 98 (Grethe B. Peterson ed., 1998) (distinguishing well-being from “choiceworthiness”); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 329 (1977) [hereinafter Sen, *Rational Fools*] (discussing “commitment” to causes or ideals as a basis for choice that “drives a wedge between personal choice and personal welfare”).

2. Claims about what people “rationally value” could refer either (strongly) to what rationality commands that they value or (weakly) to what it would not be irrational for them to value. See THOMAS NAGEL, THE VIEW FROM NOWHERE 200 (1986) (“‘Rational’ may mean either rationally required or rationally acceptable.”). In references to what people rationally value or in any comparable formulation that is preceded by a conditional verb such as “might” or “could,” or by “can,” I intend to invoke the weaker understanding.

Although this Essay ultimately confronts very large questions, I begin with a narrower focus, furnished by my colleagues Louis Kaplow and Steven Shavell in their important book *Fairness Versus Welfare*.³ In that book, Kaplow and Shavell argue that legal rules should be based exclusively on calculations involving the “well-being” or “utility” of “individuals.”⁴ (They use the terms “well-being” and “utility” interchangeably,⁵ as I shall do in the remainder of this Essay, and refer recurrently to “individuals,” apparently to emphasize that social welfare is an increasing function of individual well-being.⁶) Intending their book partly as a contribution to moral and political philosophy,⁷ Kaplow and Shavell imply that there are no moral rights not directly founded on considerations of individual well-being. In the legal domain, constitutional law furnishes an especially instructive test case for their theory’s implications and attractiveness. If accepted, Kaplow and Shavell’s argument would support recognition only of rights that tend to be utility-maximizing,⁸ or otherwise to promote overall social welfare, at least insofar as past decisions do not determine judicial rulings.⁹ Their thesis rejects the foundational assumption of much constitutional doctrine and scholarship that people have moral rights that are not all contingently grounded in utility functions.¹⁰

3. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

4. *See id.* at xvii (“Our thesis is that social decisions should be based *exclusively* on their effects on the welfare of individuals — and, accordingly, should not depend on notions of fairness, justice, or cognate concepts.”).

5. *See, e.g., id.* at 18 (equating utility and well-being).

6. *See, e.g., id.* at 24 (“Under the rubric of welfare economics, the conception of social welfare is based on individuals’ well-being.”).

7. *See id.* at xvii-xviii (“[O]ur subject is not limited to the law but rather concerns the most general questions of social policymaking . . .”).

8. Their position reflects a form of what is sometimes called “rule utilitarianism,” which “holds that we should not judge the rightness of [an] act by *its* consequences but by the consequences of adopting the *rule* under which the particular act falls.” JOHN HOSPERS, *AN INTRODUCTION TO PHILOSOPHICAL ANALYSIS* 608 (2d ed. 1967). Rule utilitarianism thus differs from act utilitarianism, which calls for case-by-case calculations of how utility could best be promoted. Although act utilitarianism is not consistent with the recognition of meaningful constitutional rights, rule utilitarianism could support a robust regime of rights — though only of rights that would tend to promote utility, without regard to any other value.

9. Kaplow and Shavell suggest that judges should generally employ welfare economic analysis insofar as they have “policymaking discretion,” but recognize that judges “are also constrained by rules of procedure, statutes, precedent, and the Constitution.” KAPLOW & SHAVELL, *supra* note 3, at 397.

10. *See generally* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 352-60 (1993) (arguing that rights reflect interests, some of which are interests in well-being, but some of which are agency and dignitary interests not reducible to well-being). I do not mean to imply that Kaplow and Shavell leave no place for rights; they do contemplate rights predicated on calculations of social utility. Nor do I wish to claim that moral and constitutional rights are never best explained by reference to inter-

For several reasons, Kaplow and Shavell's challenge deserves close consideration. The first involves their stature as scholars. Kaplow and Shavell are prominent figures in the field of law and economics.¹¹ In preparing this book, they have forayed deeply into political theory and moral philosophy,¹² as well as a number of areas of substantive law. In light of their stature, their views have a serious claim to attention. A second reason lies in the barbed character of their arguments, many of them aimed "to convince legal policy analysts" to alter their research agendas.¹³ In essence, Kaplow and Shavell argue that all law professors (and possibly all political theorists and moral philosophers) will be wasting their time at best, and rendering pernicious advice at worst,¹⁴ until they embrace Kaplow and Shavell's preferred version of welfare economics.¹⁵

The third reason that Kaplow and Shavell deserve attention involves their substantive arguments. Their main affirmative argument is familiar: rational parties who did not know what role they would occupy in society would choose to be governed by whatever rules would produce the highest average utility,¹⁶ with some additional

ests in promoting well-being; some rights are best explained in this way. But I do mean to claim, contrary to Kaplow and Shavell, that there are *some* rights that reflect values or interests other than well-being and that have some power to resist appeals to a purported overriding interest in promoting social welfare.

11. See, e.g., Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191 (1996); Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1 (1994); Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 AM. L. & ECON. REV. 63 (1999); Louis Kaplow & Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley*, 105 YALE L.J. 221 (1995); Louis Kaplow & Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 YALE L.J. 237 (2000); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000).

12. See KAPLOW & SHAVELL, *supra* note 3, at xviii (noting that they address questions that "have engaged philosophers from Aristotle to Hume and Kant, to Ross and Hare and Rawls").

13. *Id.* at 472. Kaplow and Shavell repeatedly castigate "analysts" who advocate attention to considerations of justice and fairness for failing to state their positions clearly and for failing to meet other standards of argumentative rigor. See, e.g., *id.* at 45 (asserting that "[i]t is frequently difficult to ascertain what analysts mean when they discuss the fairness of legal rules" because "[a]nalysts often use words like 'fairness' without defining them"); *id.* at 470 (criticizing proponents of fairness for failing to meet the "basic test" of stating their principles with precision).

14. See *id.* at 383 (maintaining that analysis that relies on notions of fairness tends "generally to be counterproductive").

15. See *id.* at 472 (arguing that all those who analyze legal policy issues should employ a welfare economic framework).

16. For an earlier argument that rational parties would choose the rule structure yielding the highest average utility, see John Harsanyi, *Morality and the Theory of Rational Behavior*, in UTILITARIANISM AND BEYOND 39, 45-46 (Amartya Sen & Bernard Williams eds., 1982).

weight possibly attached to the well-being of the worst-off class.¹⁷ By contrast, their main negative argument is fresh¹⁸ and, at first blush, daunting. According to them, there are easily imaginable situations in which any legal rule not based exclusively on considerations of individual well-being would make literally all affected parties worse-off than they would be under a utility-maximizing rule.¹⁹ By design, rights-based theories will sometimes leave some people worse-off than they would have been under a utility-maximizing regime; the point of such theories is to protect individual rights against the claims of social welfare.²⁰ But Kaplow and Shavell expect the recognition that rights might diminish literally everybody's well-being to dissolve the appeal of rights-based theories.²¹ Why, after all, would anyone favor a theory that threatens to make everyone worse-off?²²

17. See KAPLOW & SHAVELL, *supra* note 3, at 440-43 (defending the welfare economic approach as reflective of what rational persons, *ex ante*, would consent to).

Although Kaplow and Shavell insist that rational *ex ante* contractors would be concerned solely with promoting utility, they acknowledge that questions of fair distribution can still arise. They note two possible approaches to distributive issues that would be consistent with welfare economics, but decline to take a stand concerning which is preferable:

[U]nder the utilitarian approach, social welfare is taken to be the sum of individuals' utilities[, and how utility is distributed among individuals is considered normatively irrelevant]. Alternatively, the well-being of worse-off individuals might be given additional weight In this book we do not defend any specific way of aggregating individuals' well-being Rather, we argue, in essence, that legal policy analysis should be guided by reference to some coherent way of aggregating individuals' well-being

Id. at 27.

18. It builds, however, on earlier writing by Amartya Sen noting that it is logically impossible to be a "Pareto libertarian," or to hold simultaneously (i) that one situation is always preferable to another when it makes everyone better-off and no one worse-off and (ii) that people have rights that cannot permissibly be sacrificed in order to increase social well-being. See AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970); Amartya Sen, *Liberty, Unanimity and Rights*, 43 *ECONOMETRICA* 217 (1976); Amartya Sen, *Personal Utilities and Public Judgments: Or What's Wrong with Welfare Economics?*, 89 *ECON. J.* 537 (1979) [hereinafter Sen, *Personal Utilities*].

19. See KAPLOW & SHAVELL, *supra* note 3, at xviii, 52.

20. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1975) (defining rights as "political trumps" capable of overriding the promotion of "collective goal[s]").

21. See KAPLOW & SHAVELL, *supra* note 3, at xviii-xix ("Most individuals — including many of the philosophers we have queried — would not readily endorse a principle of fairness if doing so implies (as it does) that it may be deemed socially good to make everyone worse-off.").

22. Against the bare possibility of rights-protecting rules that make everyone worse-off, a rights theorist may of course protest that her particular theory would not have that consequence. According to Kaplow and Shavell, this protest affords no escape, for reasons involving logical consistency. See *id.* at 468 ("[I]f one embraces any notion of fairness, logical consistency implies that one has thereby endorsed the view that adopting a legal rule that makes everyone worse-off may well be good."). A rights theorist necessarily accepts the principle that rights can sometimes prevail over considerations of welfare or utility, and if this principle is a good one, then it ought to apply even in situations in which its application would reduce everyone's well-being. If a theorist blanches from this conclusion, this reaction suggests that she really does not accept the principle on which rights-based theories neces-

I begin in Part I by accepting that question as framed. The short answer is that nearly everything depends on how “well-being” and being “better-off” are defined. At some points Kaplow and Shavell appear to assume that each person’s well-being is defined by her personal rank ordering of possible states of affairs: a person is better-off insofar as she occupies a state of affairs that she rationally prefers to another state of affairs. Even if Kaplow and Shavell employed that definition consistently, their arguments would not be wholly persuasive. In imaginable cases, a society would behave wrongly if it created a state of affairs in which every living member regarded herself as better-off, but did so without regard to the implications for future generations whose values and preferences are not yet formed.²³ Imagine, for example, a society in which everyone prefers intellectual and spiritual tranquility to a state of affairs in which freedoms of speech and religion are recognized, precisely because those freedoms might tend to subvert tranquility. Each would willingly trade her freedom to unsettle others for an enforceable prohibition against others roiling her, even though many would be unwilling unilaterally to forego practices that might disturb others in the absence of legal regulation and the assurance of reciprocity that it provides. Even in such a case, what people contingently prefer (taken for the moment as the measure of each’s well-being) is not the exclusive measure of choice-worthiness or what the law ought to be.

To begin with, the interests of future generations need to be considered²⁴ — people as yet unborn, whose values and preferences are likely to be shaped by the environment in which they are raised.²⁵ Even if every living member of a society thought otherwise, it would be wrong (from what I shall describe in Part III as an “impersonal” moral standpoint) to deny future generations the background conditions necessary to develop a critical and self-critical perspective on prevailing patterns of thought, ambition, and belief. More generally, thought about future generations drives a wedge between what people value or prefer, on the one hand, and what they have reason to value or prefer, on the other. As I shall argue in Part III, moral argument is ultimately argument about the force of reasons.

sarily rest — that principles of individual right are sometimes independent of and more important than considerations of individual and social welfare. *See id.* at 56.

23. *See generally* JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 109-40 (1983) (discussing “adaptive preference formation” and arguing that social policy should not be based solely on wants or preferences, independent of consideration of whether those wants or preferences were autonomously formed and are ethically defensible).

24. For discussion of the interests of unborn generations, see *infra* notes 168-169 and accompanying text.

25. *See, e.g.*, GARY S. BECKER, *ACCOUNTING FOR TASTES* 16 (1996) (noting that “[c]ulture exercises a sizable influence over preferences”).

Admittedly, however, cases in which rights-based theories would call for overriding literally everyone's preferences are the most difficult, testing ones for their defenders. If Kaplow and Shavell could sustain the equation of each person's well-being with that person's ranked preferences, and if rights-based theories regularly called for overriding everyone's preferences, then such theories would be difficult to defend. But Kaplow and Shavell cannot consistently equate each person's well-being with each's individual preference order among possible states of affairs. The equation dissolves when they move from their negative argument against rights-based theories to their positive argument in favor of welfare economics.

As defined and championed by Kaplow and Shavell, welfare economics requires interpersonal comparisons of utility.²⁶ On a narrow view of the limits of economic analysis, economists can identify policy changes that would make everyone better-off, but possess no distinctive capacity to make value judgments about the desirability of actions that would make some people better-off while diminishing the well-being of others (unless well-being is implausibly equated solely with money or wealth or otherwise measured by reference to an imagined market in which the components of well-being are assigned a dollar value).²⁷ Kaplow and Shavell are more normatively ambitious. When some people are made better-off and others worse-off, Kaplow and Shavell insist that we need to make quantitative assessments, comparing the gains in well-being of the winners with the losses of the losers. But interpersonal comparisons are impossible without a substantive definition of well-being as a specific good or package of goods that each person possesses in measurable quantities — for example, one that equates well-being with an experiential state such as happiness, or with the overall satisfaction of desires over a lifetime, or with the possession of objectively valuable goods and opportunities. As I shall argue at length, once well-being is given the kind of substantive definition necessary to support meaningful interpersonal comparisons,

26. See KAPLOW & SHAVELL, *supra* note 3, at 24 n.15 ("Implicit in any social welfare function is a comparison of, and a way of trading off, different individuals' utilities.").

27. Richard Posner once championed the equation of social welfare with wealth maximization. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Distribution*, 8 HOFSTRA L. REV. 487 (1980); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) [hereinafter Posner, *Utilitarianism*]. This approach calls for increases and decreases in personal well-being to be measured by assigned prices, reflecting people's willingness to pay either to achieve or to avoid particular outcomes. See Posner, *Utilitarianism, supra*. As Posner has subsequently recognized, however, this approach is morally unattractive, because it makes well-being "dependent on the assignment of property rights and . . . on the distribution of wealth across persons." Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 99-100 (David Owen ed., 1995). Kaplow and Shavell expressly reject the idea that individual well-being and social welfare could be measured solely in terms of wealth. See KAPLOW & SHAVELL, *supra* note 3, at 35-36.

a conceptual gap emerges between well-being and what everyone necessarily values most. On the most plausible substantive accounts, each of us might sometimes value other things more than our own well-being (as thus defined and measured). For example, we might rationally value moral or aesthetic ideals more than any experiential state, such as happiness,²⁸ or more than the maximal satisfaction of our changing desires over the course of our lives.

Part I also develops an important implication of the argument that well-being — once given the kind of substantive definition that welfare economics requires — is not necessarily what each of us values most. Kaplow and Shavell rightly argue that a theory that weighs considerations other than well-being could dictate results that reduce everyone's well-being. But their welfare economic approach invites a symmetrical objection: if people can rationally value freedoms or ideals more than their own well-being, then a theory that *only* considers well-being could imaginably mandate the imposition of legal rules that literally no one would choose.

Part II contests Kaplow and Shavell's argument that if people did not know what positions they would occupy in society, they would always choose legal rules based on their own anticipated well-being. Part II also challenges the assumption that imagined *ex ante* contracts can always provide adequate justification for particular legal rules, even when the contingently surrounding rule structure could not be similarly justified.

Finally, Part III sketches the affirmative theory that is presupposed by many of my criticisms in Parts I and II. Building on earlier observations, I explain when and why well-being matters in moral and legal decisionmaking, but why other values sometimes matter more from both a personal and a moral point of view. As Kaplow and Shavell emphasize, some moral and legal rights have as their purpose the promotion of human well-being. But Part III argues that other values help to support other rights. Freedoms of speech and religion, in particular, reflect the insight that well-being is not all that we have reason to value, nor always what we have reason to value most. Part III also argues that reasons, not well-being or utility, are the ultimate currency of moral argument.

I should say a word at the outset about how my general approach and conclusions compare with those of Kaplow and Shavell. Kaplow and Shavell launch their sharpest attacks against moral theories that purport to eschew appeal to consequences of any kind.²⁹ Like them, I

28. As I explain in Part III, the realization of moral ideals may contribute to happiness and well-being, but need not always do so, and in any event is not typically sought for the sake of well-being. See *infra* notes 137-154 and accompanying text.

29. They furnish a particularly dramatic example, involving retributive theories of punishment. As portrayed by Kaplow and Shavell, retributivists believe that punishment should always match the severity of the predicate crime. See KAPLOW & SHAPELL, *supra* note 3, at

am deeply skeptical of such theories. Indeed, I regard many of their attacks on legal scholarship that presupposes the validity of such theories as entirely convincing, even brilliant. I differ, however, in denying that the only consequences that matter morally are consequences for human well-being, once the concept of well-being is substantively defined.

I. WELL-BEING: A CONCEPT IN SEARCH OF A DEFINITION

At the heart of Kaplow and Shavell's argument lies a definitional contrast between fairness or rights-based theories, on one hand, and welfare economics on the other.³⁰ In assessing legal rules, welfare economics, which Kaplow and Shavell commend, appeals only to considerations of individual well-being;³¹ it regards social welfare as an increasing function of individual well-being.³² By contrast, they define fairness or rights-based theories, which they condemn, as theories that give weight to considerations other than individual well-being.³³ According to Kaplow and Shavell, such theories err grievously by threatening to diminish the well-being of literally everyone.³⁴

Kaplow and Shavell expect all to agree that a policy would be indefensible if it reduced everyone's well-being.³⁵ This anticipated agreement depends on a crucial assumption that everyone values well-being above all else. Upon reflection, however, it seems plain that whether everyone would attach this priority to being well-off, or the corresponding disvalue to being less well-off, depends on what well-

302. Retributivists believe that the imposition of a more severe sanction would violate the rights of the person being punished, even if the more severe penalty would have an overwhelmingly successful deterrent effect. Indeed, Kaplow and Shavell assert, a consistent retributivist would think it wrong for a legal system to establish a penalty that was disproportionate to the severity of the underlying crime, even if the higher threatened sanction would wholly eliminate commission of the crime and thus obviate the need for any punishment at all. *See id.* at 311-13, 329-31.

30. *See id.* at 3 (framing this contrast).

31. *See id.* at 5 (“[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.”); *id.* at 16 (“The hallmark of welfare economics is that policies are assessed exclusively in terms of their effects on the well-being of individuals.”).

32. *See id.* at 24 (“[S]ocial welfare is postulated to be an increasing function of individuals' well-being.”).

33. *See id.* at 28 (“[O]ur definition of notions of fairness includes all principles — but only those principles — that give weight to factors that are independent of individuals' well-being.”); *id.* at 39 (“Notions of fairness have the property that evaluations relying on them are not based exclusively — and sometimes are not dependent at all — on how legal policies affect individuals' well-being.” (emphasis omitted)).

34. *See id.* at 52-58 (developing this argument).

35. *See id.* at 468-69 (“[W]e suspect that the fact that any notion of fairness may involve making everyone worse off will be seen as troubling.”).

being is or what it means to say that everyone is better or worse-off. To illustrate the point, suppose I stipulate that well-being consists of having money,³⁶ then argue that no one could reasonably support a rule that would diminish everyone's monetary wealth, because such a rule would make everyone worse-off. This argument would fail. If well-being were defined as having money, people might sometimes value other things more than an increment of well-being — freedom of speech or religion, for example, or leisure, or cleaner air. Before we can judge the value of well-being, we need to know what well-being is.

Here, however, a methodological challenge arises. Well-being is not a concept with clear, pre-existing boundaries. The literature abounds with rival definitions.³⁷ To assess the claim that public policy should be based solely on considerations of well-being, it is necessary to consider two sets of questions. First, how do Kaplow and Shavell define well-being, and is it plausible to think that law and public policy should be based solely on well-being as they define it? Second, what would be the best or most perspicuous account of well-being, and what role should this conception play in the design of public policy?

In this Part, I am mostly concerned with how Kaplow and Shavell define well-being and with whether well-being, as thus defined, is necessarily what everyone would value most. I deal more extensively with the second question, involving the most perspicuous account of well-being and its relation to other values, in Part III.

A. *The Looseness of Kaplow and Shavell's Definition*

Surprisingly, in a book arguing that legal rules should be based exclusively on considerations of well-being — and one repeatedly excoriating fairness theorists for failing to define their terms precisely³⁸

36. The equation of well-being with money would reflect a crude caricature of the equation of social welfare with wealth, defined to include not only money but other goods capable of being assigned monetary prices. *Cf. supra* note 28 (discussing the measurement of well-being).

37. *See infra* notes 60-76 and accompanying text (discussing conceptions of well-being prominent in the literature). As indicated by these disputes, "well-being" occupies the category of "essentially contestable concepts." *See* W.B. Gallie, *Essentially Contestable Concepts*, 56 *PROC. OF THE ARISTOTELIAN SOC'Y* 167, 167-68 (1956) (using this terminology to describe concepts that are at once evaluative and descriptive and have sufficiently diverse criteria of application that no single, preferred definition can be extracted merely from examination of ordinary usage); *see also* WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10-44 (2d ed., Princeton Univ. Press 1983) (1974) (discussing essentially contested concepts).

38. *See* KAPLOW & SHAPELL, *supra* note 3, at 45 (asserting that "[i]t is frequently difficult to ascertain what analysts mean when they discuss the fairness of legal rules" because "[a]nalytists often use words like 'fairness' without defining them"); *id.* at 470 (criticizing proponents of fairness for failing to meet the "basic test" of stating their principles with precision).

— Kaplow and Shavell give no clear account of what well-being is.³⁹ They come closest to offering a definition on pages 18-19:

The notion of well-being used in welfare economics . . . incorporates in a positive way everything that an individual might value — goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth. . . . The only limit on what is included in well-being is to be found in the minds of individuals themselves, not in the minds of analysts.⁴⁰

This formulation leaves open as much as it resolves. Although it says that well-being “incorporates . . . everything that an individual might value,” it fails to specify *how* well-being does so. It suggests that well-being is somehow relative to individuals, or resides in the minds of individuals, but does not say *what* well-being is or by what states of mind it should be measured.

The looseness of Kaplow and Shavell’s definition proves important when, not having pinned themselves down, they subsequently make arguments that presuppose two very different, and ultimately incompatible, measures of well-being. Their negative arguments against rights-based moral theories presuppose what I shall term an “ordinal” definition of well-being.⁴¹ Under an ordinal definition, a person’s well-being depends entirely on her subjective ranking of the state of affairs that she occupies, relative to other possible states of affairs, regardless of the subjective basis for her preferences.⁴² But Kaplow and Shavell make other arguments presupposing what I shall call a “substantive” theory of well-being. In particular, they argue that decisionmakers must make interpersonal comparisons of utility,⁴³ in order to determine, for example, whether one person’s gain in well-being is large enough to compensate for another’s loss. As I shall explain, interpersonal comparisons are impossible unless well-being is capable of cardinal or quantitative — not merely ordinal — measurement. More particularly, interpersonal comparisons require a substantive

39. In principle, Kaplow and Shavell recognize the importance of having well-being clearly defined. *See id.* at 16 (noting “the central importance of the concept of well-being to welfare economics”); *id.* at 409 (asserting that “understanding the meaning and breadth of the concept of individuals’ well-being is of central importance”).

40. *Id.* at 18-19.

41. *See, e.g., id.* at 30 n.27 (asserting that people are made worse-off when “given less of those things that they value more than the analyst does and more of those things that they value less than the analyst does”).

42. *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 83 n.3 (16th ed. 1998) (“A statement such as ‘Situation A is preferred to Situation B’ — which does not require that we know how much A is preferred to B — is called *ordinal*, or dimensionless. Ordinal variables are ones that we can rank in order, but for which there is no measure of the quantitative difference between the situations.”).

43. *See id.* at 24 n.15.

definition of well-being, as a particular good or package of goods that each person possesses in varying, comparable quantities.

Confusion results from using the single term “well-being” to encompass these different ordinal and substantive notions. The power of Kaplow and Shavell’s arguments against fairness theories arises from their implicit reliance on an ordinal conception of well-being: if everyone would rank state of affairs A as better than state of affairs B, it is hard to defend a fairness theory that would mandate B rather than A. But the welfare economic analysis that they champion requires a substantive conception of well-being, not an ordinal one.⁴⁴ What is more, a substantive conception must equate well-being with a particular good or package of goods — despite the possibility that the maximum attainment of that good or package of goods is not what every person, in her ordinal rankings, would value most. In other words, each person’s ordinal rankings of her own well-being might reflect standards of valuation not captured by a transpersonal substantive conception of well-being — such as Kaplow and Shavell’s welfare economic analysis requires — that equates well-being with a particular good or package of goods.

1. *The Inadequacy of an “Ordinal” Account of Well-Being*

Under an ordinal measure, each person’s well-being is defined by her ranked preferences for certain states of affairs over others.⁴⁵ If a person prefers state of affairs A to state of affairs B, then her well-being is increased by a move from B to A, regardless of the grounds for her preference. Certain passages in *Fairness Versus Welfare* suggest that Kaplow and Shavell mean to define well-being in just this substantively empty way.⁴⁶

44. Their version is thus an ambitious one, in both its positive and its normative dimensions. Cf. SAMUELSON & NORDHAUS, *supra* note 42, at 83 (noting that “[e]conomists today generally reject the notion of a cardinal, measurable utility” and conduct only the more limited types of analyses permitted by ordinal measures of well-being).

45. Economists commonly assume that such a preference order can be constructed “by first imposing rationality axioms on the decisionmaker’s preferences and then analyzing the consequences of these preferences for her choice behavior.” ANDREU MAS-COLELL ET AL., *MICROECONOMIC THEORY* 5 (1995). An alternative approach “treats the individual’s choice behavior as the primitive feature and proceeds by making assumptions directly concerning this behavior.” *Id.*; see also KEN BINMORE, *GAME THEORY AND THE SOCIAL CONTRACT VOLUME I: PLAYING FAIR* 105-06 (1994) (noting that under a revealed preference approach “[o]ne observes some of the choices that a player makes and then argues that he is making choices *as though* he were equipped with a preference relation”); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 12-13 (1999) [hereinafter SEN, *COMMODITIES*] (observing that the equation of utility with a choice function is common “in the modern economic literature” and “goes back at least to the origin of the ‘revealed preference’ school” in a 1938 article by Paul Samuelson).

46. See, e.g., KAPLOW & SHAVELL, *supra* note 3, at 19 n.8 (suggesting that well-being should be defined in terms of “what the individuals under consideration really care about”); *id.* at 58 (“[I]t is virtually a tautology to assert that fairness-based evaluation entails some

As I noted in the Introduction, even if Kaplow and Shavell consistently defined well-being in this way, it would be a mistake to conclude that a legal rule that reduced everyone's well-being (as thus defined) should *always* be deemed morally unacceptable. To reach this conclusion, some admittedly peculiar cases need to be considered, because it is hard to imagine how a rule dispreferred by literally everybody might ever get implemented. But the question retains its interest as one of moral right or wrong: even if every living person in a particular society preferred state of affairs A to state of affairs B, could it ever be said, from a detached or impersonal moral perspective, that A is morally worse? To this question, for reasons that I shall explain more fully in Part III, I believe the answer to be yes. Among the pertinent considerations are how existing preferences were formed and whether decent opportunities existed for critical and self-critical reflection.⁴⁷ In the Introduction, I thus imagined a society in which every living person would willingly trade her freedoms of speech and religion for the social and psychological tranquility expected to ensue from an enforced orthodoxy. Despite the imagined consensus that free speech would make everyone worse-off, I argued that it would be wrong for the imagined society to enforce prohibitions against (or in some cases to withhold) expression necessary to enable succeeding generations to form relatively independent judgments about the kind of life most worth living. Autonomy is a value of foundational moral importance.⁴⁸ And respect for autonomy, in a morally important sense of the term, requires the promotion of cultural conditions conducive to critical and self-critical reflection.⁴⁹

It might be objected that my rejection of unanimous agreement among living members of a society as the ultimate test of moral correctness depends on far-fetched cases and has little practical salience: in virtually all cases likely to arise, surely rights-based theories should be deemed unacceptable if they risk producing outcomes that literally everybody would think worse than identifiable alternatives. But the suggestion to ignore far-fetched cases lends no

sort of reduction in individuals' well-being, for notions of fairness are principles of evaluation that give weight to factors unrelated to individuals' well-being.").

47. On the moral relevance of the circumstances under which preferences are formed, see, for example, ELSTER, *supra* note 23, at 109-40.

48. On autonomy and its significance, see, for example, GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988); JOHN RAWLS, *POLITICAL LIBERALISM* 72-81, 199-200 (1993); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

49. See Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 *STAN. L. REV.* 875, 876-78 (1994) [hereinafter Fallon, *Two Senses*] (distinguishing a "descriptive" sense of autonomy, as a condition that exists as a matter of degree and is capable of promotion, from an "ascriptive" sense of autonomy that refers to the supposed metaphysical foundation of people's rights to make decisions for themselves). When autonomy is used in the descriptive sense, it "requires the capacity to reflect upon, order, and self-critically revise the tastes, passions, and desires that present themselves as reasons for action." *Id.* at 887.

support to Kaplow and Shavell's argument that rights-based theories should be rejected because they risk making everyone worse-off. On the contrary, Kaplow and Shavell's argument requires far-fetched cases to achieve any bite whatsoever.

If asked to rank their personal preferences, most fairness theorists would presumably prefer living under fairness-based rules to living under rules based entirely on other considerations. If so, and if well-being is defined ordinally by reference to each person's preferences for states of affairs, then no legal rule that was preferred by even a single fairness theorist could diminish everyone's well-being; if the fairness theorist values fairness over other goods, then her well-being will increase (under an ordinal definition of well-being) if fairness-based rules are adopted.⁵⁰

Absent a more substantive definition of well-being, Kaplow and Shavell's principal fresh argument against rights-based theories — that they risk making everyone worse-off — thus succeeds only insofar as rights-based rules are adopted for situations in which literally no one thinks they ought to be adopted. This is a logically possible hazard, but a somewhat other-worldly one. For Kaplow and Shavell's negative arguments to work against real-world opponents, they need a substantive definition that both distinguishes well-being from other possible grounds for choice and makes it possible to explain why everyone would judge well-being to be more valuable than any other good — such as the protection of rights or the promotion of fairness — for which well-being might be sacrificed.

Of equal importance, Kaplow and Shavell need a substantive conception of well-being in order to carry out the welfare economic analysis that they endorse. Their version of welfare economics requires interpersonal comparisons of well-being or utility.⁵¹ If a change in the prevailing legal rule would increase Smith's well-being but diminish Jones's, Kaplow and Shavell maintain that we need to know the size of Smith's gain in comparison with Jones's loss in order to gauge the net effect on social welfare. In order to make the requisite comparison, however, we need to look at something more than Smith's and Jones's bare preference orderings. Interpersonal comparisons presuppose that well-being comes in measurable quantities.

To get from preference orderings to commensurable units of well-being, it would be logically possible simply to assign numerical values

50. See Michael B. Dorf, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847, 859 (2002) (noting that strong advocates of a fairness theory will be made worse-off by the adoption of any other theory).

51. See KAPLOW & SHAVELL, *supra* note 3, at 24 n.15 ("Implicit in any social welfare function is a comparison of, and a way of trading off, different individuals' utilities.")

to each person's ordinal preference rankings,⁵² perhaps ascribing a value of one to the most preferred outcome and zero to the least preferred along some bounded scale, and then to make interpersonal comparisons based on the assigned numerical representations.⁵³ As I shall argue more fully in Part III, however, any effort to define and measure well-being by equating it with preference orderings would misdescribe both moral and psychological reality. We value diverse goods in diverse ways and for diverse reasons; our own well-being — which I shall loosely define in Part III by reference to the overall quality of our psychological experience — is one good, but not the only good that we may value. A person who sacrifices her life to save others pursues a goal that she values more than her own well-being — not the greatest quantity of well-being, or indeed the greatest quantity of anything else, that she is capable of attaining. In light of the variety of reasons for which we may value goods and ideals, the equation of well-being with numerical values assigned to ordinal preference rankings would mischaracterize both well-being (which is not the only consideration underlying preference orderings) and the complex foundations of judgments of relative value (which need not aim at the maximization of any single good). This being so, the resulting numerical comparisons would be too conceptually as well as epistemically arbitrary to serve as the sole relevant consideration in the design of legal policies.⁵⁴

Most philosophers and economists who support interpersonal comparisons of well-being do not contend otherwise. Instead of attempting to assign quantitative values to purely ordinal preference rankings, they assume almost without exception that well-being must be defined substantively, as something (such as happiness or the satis-

52. This is the approach famously advanced for the purpose of making *intrapersonal* utility comparisons in JOHN VON NEUMANN & OSCAR MORGENSTERN, *THE THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944).

53. See Peter J. Hammond, *Interpersonal Comparisons of Utility: Why and How They Should Be Made*, in *INTERPERSONAL COMPARISONS OF WELL-BEING* 200, 215-16 (Jon Elster & John E. Roemer eds., 1991) [hereinafter *INTERPERSONAL COMPARISONS*] (considering but rejecting this possibility).

54. See *id.* at 216 (arguing that if "some undemanding person . . . achieves his upper bound at a low level of consumption," whereas a "greedy" person reaches his upper bound only at a much higher level, "and if we distribute goods to each individual so that each achieves, say, 90% of his maximum utility (which is now a well-defined utility level), then the greedy person is likely to be given much more than one feels he deserves").

In arguing that numerical values assigned to ordinal preference rankings would be conceptually and epistemically arbitrary, I do not mean to deny that interpersonal comparisons of well-being are possible, so long as well-being is defined in conceptually plausible terms that permit interpersonal comparisons. For example, I accept that it is possible to make rough interpersonal comparisons of experiential states or of the extent to which different people possess objective goods. (If well-being were defined in those terms, I would, however, maintain that well-being is not necessarily what everyone values most.) I mean only to reject the possibility of quantitative interpersonal comparisons of well-being that are based directly on ordinal preference orderings and exclude all other information.

faction of desires, for example) that each person's preference rankings seek to maximize, the attainment of which can be measured in quantitative terms.⁵⁵ In much of their argument, Kaplow and Shavell accept this approach. Somewhat surprisingly, they purport to be agnostic about which substantive measure of well-being ought to be used,⁵⁶ saying only that "legal policy analysis should be guided by reference to *some* coherent way of aggregating individuals' well-being."⁵⁷ Plainly, however, selecting a "coherent way of aggregating individuals' well-being" will require the adoption of a substantive theory or measure of well-being, such that each person can be said to possess some quantity of it that can then be compared with every other person's.

2. *Substantive Accounts of Well-Being and Their Relation to Rational Choice*

Although necessary for the welfare economic analysis that Kaplow and Shavell champion, movement from an ordinal to a cardinal and indeed to a substantive theory of well-being does not come without cost to their argument. Once a substantive theory or measure of well-being is adopted, the claim that the greatest possible well-being is necessarily what everyone values most — which is tautologically true if each person's well-being is measured by her ordinal preference rankings — ceases to be tenable.⁵⁸ If well-being is defined substantively, it is always an open question whether any particular theory or measure of well-being accurately captures what everyone values most.⁵⁹ If not, then a reduction in everyone's well-being, as thus defined, might not be unacceptable after all (whether in reasonably imaginable or in far-fetched cases). We would need to know what was obtained instead.

In the philosophical and economic literature, the leading theories of well-being cluster into three categories — objective list theories,

55. Cf. BECKER, *supra* note 25, at 23 (advancing an economic model of rational choice under which choices are assumed to be "forward-looking" and "maximizing").

56. See KAPLOW & SHAVELL, *supra* note 3, at 27 n.22 (citing the literature discussing whether interpersonal utility comparisons are possible and, if so, what common measure ought to be used). For an introduction to some of the leading positions and central issues, see INTERPERSONAL COMPARISONS, *supra* note 53.

57. KAPLOW & SHAVELL, *supra* note 3, at 27.

58. See SEN, *COMMODITIES*, *supra* note 45, at 2-3 ("[O]ne's view of one's own welfare and the maximand in choice behaviour may each respectively be called 'utility' without great difficulty, but if *both* are called 'utility' and treated as the same, then it would have been implicitly presumed that what one always maximizes is indeed one's own welfare.").

59. Cf. GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* 68-69 (Thomas Baldwin ed., rev. ed., with pref. to the 2d ed. and other papers 1993) (objecting to efforts to equate goodness with natural properties by noting that such efforts always leave open the question about any particular natural property: "Is this good?").

experiential theories, and preference-based theories.⁶⁰ Yet none establishes well-being as a good that all rational people would always value over other, sometimes competing, values. As I have suggested already and shall argue more fully in Part III, there are many goods, choice among which can rationally rest on diverse grounds. We can, and do, value things besides our own well-being (as defined by the most plausible substantive measures).

"Objective list"⁶¹ theories hold that a person's well-being consists of having certain goods and opportunities that are objectively valuable, or that people have reason to desire, or that are typically necessary or useful for a fulfilling life.⁶² Although otherwise unclear about what well-being is, Kaplow and Shavell reject objective list theories, apparently because such theories leave too little room for subjective valuation.⁶³ In their view, both value and well-being are relative to individual tastes.⁶⁴

A second leading approach equates well-being with an experiential state such as pleasure or happiness.⁶⁵ The appeal of experiential conceptions lies largely in their capacity to explain why everyone would value well-being. Pleasure and happiness are plausibly viewed as states that every normal person would regard as a good, both for herself and for others.⁶⁶ Pain seems equally to be an experiential state that everyone, or nearly everyone, would wish to avoid, possibly for reasons too basic to permit further explanation.

60. For substantially similar tripartite categorizations, albeit using slightly different labels, see, for example, JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 7-72 (1986); L.W. SUMNER, *WELFARE, HAPPINESS, AND ETHICS* 45-137 (1996); Scanlon, *supra* note 1, at 99-119.

61. This label apparently traces to DEREK PARFIT, *REASONS AND PERSONS* 493 (1984).

62. See SUMNER, *supra* note 60, at 45-80 (describing and critiquing various "objective" theories).

63. See KAPLOW & SHAVELL, *supra* note 3, at 29-30 n.27 ("[W]hen the analyst decides which goods are primary . . . and what importance each is to have, and then weights them differently from how the actual individuals in society weight them . . . individuals will be made worse off . . . Indeed, such . . . approaches sometimes would favor regimes under which everyone is worse off.").

64. See *id.* (asserting that people are made worse-off when "given less of those things that they value more than the analyst does and more of those things that they value less than the analyst does").

65. This approach traces to JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 11-12 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1970) (1780) (defining utility in terms of "pleasure" or "happiness"), and JOHN STUART MILL, *Utilitarianism*, in *UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* I, 6 (H.B. Acton ed., 1972) ("The creed which accepts as the foundation of morals, Utility or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.").

66. See, e.g., Scanlon, *supra* note 1, at 97 ("We all care about the experiential quality of our lives and have reason to do so.").

Even if certain experiential states are widely valued and others disvalued, however, people commonly value things besides experiential states.⁶⁷ John Stuart Mill thought it a better, more choice-worthy life to be like “Socrates dissatisfied than a fool satisfied.”⁶⁸ A person taking this view might choose to live in a society protecting broad freedom of speech, even if what was said made her less happy overall than she would be in a society in which speech was sharply constrained. To cite just one more example, at the end of his life, Freud reportedly refused any drug stronger than aspirin, despite suffering excruciating pain, because he valued the capacity to think clearly more than pleasure, happiness, or the avoidance of pain.⁶⁹

A third kind of theory, defining well-being as the satisfaction of desires or preferences,⁷⁰ might seem to draw a tighter, even conceptual, connection between individual well-being and what everyone values most.⁷¹ To have a preference is to prefer that it be satisfied; and it might seem to follow that everyone would place the highest value on having her preferences as fully satisfied as possible. But this apparent tautology depends on the assumption that preference satisfaction is defined ordinally, measured by each person’s rank ordering of possi-

67. See, e.g., GRIFFIN, *supra* note 60, at 13 (noting that “we desire things other than states of mind”); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42-45 (1974) (arguing that people would rationally refuse to surrender themselves to a machine designed to produce pleasurable or satisfying states of consciousness because we value challenge and achievement sometimes more than states of consciousness); cf. KAPLOW & SHAVELL, *supra* note 3, at 18 (“Well-being is not restricted to hedonistic and materialistic enjoyment or to any other named class of pleasures and pains.”).

68. MILL, *supra* note 65, at 9. Curiously, Mill believed this view consistent with the definition of well-being or utility as an experiential state, but critics have persuasively argued otherwise. See H.B. Acton, *Introduction to MILL*, *supra* note 65, at ix, xiii-iv (asserting the untenability of Mill’s position).

69. See GRIFFIN, *supra* note 60, at 8.

70. Leading works equating utility or well-being with the satisfaction of preferences or desires include R.M. HARE, MORAL THINKING (1981), Harsanyi, *supra* note 16, at 54-56, and J.A. Mirrlees, *The Economic Uses of Utilitarianism*, in UTILITARIANISM AND BEYOND, *supra* note 16, at 63.

71. Although Kaplow and Shavell do not expressly affirm a preference-satisfaction account of well-being, much of their text invites the conclusion they in fact equate well-being with the satisfaction of preferences. They say, for example, that, although they typically assume well-being to be unambiguous, “if individuals do not understand how their 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.” KAPLOW AND SHAVELL, *supra* note 3, at 23. In the course of a long section, *id.* at 409-36, discussing “preferences and individuals’ well-being,” they approvingly cite authors who have claimed that normative analysis should be based on “rational, fully informed preferences.” *Id.* at 410 n.24. And they insist repeatedly that notions of fairness become relevant to welfare economic analysis insofar, but only insofar, as people have a “taste” or “preference” for fairness. See, e.g., *id.* at 431-36 (discussing “tastes for notions of fairness”).

Kaplow and Shavell do not, however, expressly embrace a substantive conception of well-being as preference satisfaction, and nothing in my argument depends on the assumption that they equate well-being with preference satisfaction.

ble states of affairs.⁷² As I have argued already, however, individual rank orderings are insufficient to support meaningful interpersonal utility comparisons. Interpersonal comparisons require cardinal measures of well-being, and the most plausible cardinal measures presuppose a substantive conception of well-being as something lying behind individual preference orderings — something that each person gets more or less of as she moves from one ranked state of affairs to another.

Once the requirement of quantification is introduced, I doubt that there could be a coherent, substantive, ethically significant notion of well-being as preference satisfaction that did not collapse into an experiential conception.⁷³ On this view, to say that Jones's preferences are better satisfied than Smith's is just to say that Jones enjoys a better experiential state, one of greater satisfaction. Lending support to this interpretation, leading proponents of a preference-satisfaction conception of well-being call for well-being to be measured by reference either to general laws of psychology⁷⁴ or through thought experiments in which an observer imagines others' psychological states and compares their intensity or satisfactoriness with her own.⁷⁵ What is more, if preference-satisfaction conceptions of well-being are not experiential conceptions, then their ethical significance would seem doubtful. In the absence of an experiential payoff, it is far from obvious that a person's well-being is enhanced whenever her preferences are satisfied, or that there is any ethical reason to aim to satisfy others' preferences.⁷⁶ Suppose, for example, that Jones prefers that Christians

72. See Sen, *Personal Utilities*, *supra* note 18, at 551-52 (“[I]f utilities are defined entirely in terms of choice, then a person will be seen as maximising his utility in every feasible choice. But this assertion, then, is no more than a tautology.”); Sen, *Rational Fools*, *supra* note 1, at 323 (observing that many economists assume that “the only way of understanding a person's real preference is to examine his actual choices, and there is no choice-independent way of understanding someone's attitude towards alternatives”).

73. Cf. Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 *YALE L.J.* 165, 206-08 (1999) (noting arguments that preference-based theories must ultimately collapse into theories that equate well-being with either objective goods or an experiential state).

74. See Harsanyi, *supra* note 16, at 50 (asserting that “any interpersonal utility comparison is based on what I will call the *similarity postulate* . . . that, once proper allowances have been made for the empirically given differences in taste, education, etc., between me and another person, then it is reasonable for me to assume that our basic psychological reactions to any given alternative will be otherwise much the same”).

75. See HARE, *supra* note 70, at 128-29 (proposing a method of making interpersonal comparisons that depends on “reduc[ing] comparisons between other people's preferences to comparisons between our own”).

76. See Adler & Posner, *supra* note 73, at 202-03 (endorsing a “restricted” preference or desire-based account of well-being under which the mere satisfaction of a person's preferences cannot be deemed to increase her well-being unless further conditions are satisfied, including possibly a condition that the person have a psychological experience of satisfaction).

should always be given advantages over non-Christians. Suppose further that a Christian is given an advantage over a non-Christian, but that Jones knows nothing about it and that the course of her life is wholly unaffected. Although Jones's preference has been satisfied, I find it implausible that her well-being is thereby increased. I find it equally implausible that Jones's preference should count as a factor of any ethical weight whatsoever in determining whether Christians should be given advantages over non-Christians in situations that are unknown to Jones and that leave her life unaffected. It is not of course implausible to think that Jones's well-being would be increased if she knew that a Christian received an advantage over a non-Christian and if she felt a resulting sense of pleasure or gratification. But the need to appeal to psychological experience supports the view that preference-satisfaction conceptions of well-being are ultimately experiential ones, with preference satisfaction mattering only insofar as it contributes to the quality of a person's psychological experience.⁷⁷ If preference-satisfaction conceptions of well-being are actually experiential conceptions, however, then they are vulnerable to the objection that I raised earlier: we both can and sometimes do value the realization of ideals more than maximizing personal psychological satisfaction.

Whether or not preference-satisfaction conceptions of well-being are ultimately reducible to experiential conceptions, the notion that everyone would accord the highest value or rank order to the maximal satisfaction of her preferences, regardless of what those preferences might be or become, dissolves upon a close examination of the relationships among maximal preference satisfaction, choice, and informed choice. As it turns out, there is a conceptual and sometimes a practical difference between maximally satisfying a person's preferences — once preference satisfaction is understood in substantive terms, rather than measured by a person's ordinal ranking of states of affairs — and giving a person what she would rationally choose for herself.⁷⁸

An example drawn from constitutional law will begin to illustrate the complex relationships among maximal preference satisfaction, choice, and informed choice. Suppose that legal analysts wish to determine when the government should be permitted to forbid political speech that either advocates violation of the law or is likely to encourage violation of the law.⁷⁹ Suppose further, for sake of simplic-

77. See Scanlon, *supra* note 1, at 100 (developing a similar argument).

78. For other arguments rejecting the equation of well-being with the maximal satisfaction of a person's preferences, regardless of what those preferences happen to be, see, for example, SUMNER, *supra* note 60, at 134-35; Sen, *Rational Fools*, *supra* note 1, at 329.

79. The Supreme Court cases dealing with this issue are excerpted, summarized, and analyzed in JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR, & STEVEN H. SHIFFRIN, *CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS* 570-613 (9th ed. 2001).

ity, that there are just three possible rules. Under a Bad Consequences Rule, the government may punish speech whenever it has any tendency to promote consequences, however remote, that the government might reasonably deem harmful. Under a Clear and Present Danger Rule,⁸⁰ the government may punish speech only if it presents a clear and present danger of serious harm. Under an Advocacy of Imminent Illegality Rule, the government may not punish speech criticizing or urging resistance to laws and governmental policies unless the speaker expressly advocates imminent illegal conduct and her advocacy poses a serious risk of great, imminent harm.⁸¹ Suppose finally, again for sake of simplicity, that the question is restricted to which of these rules would best promote the well-being of a single person, Jones.

We can imagine first that what would satisfy Jones's preferences might be defined by what she, if asked, would actually choose. But writers who equate well-being with preference satisfaction view this approach as too simplistic.⁸² Among other things, the effect of the various rules in promoting the satisfaction of Jones's preferences would also depend on the rules' effects in, for example, promoting a vibrant society, which we may assume that Jones would value, or causing a breakdown of public order, which she would dislike. When questions about likely consequences grow complex, many people lack sufficient information to answer competently.

When people would be prone to make bad calculations, proponents of a preference satisfaction conception of well-being typically suggest that preference satisfaction (and thus a person's well-being) is defined by what a person would choose if fully rational and fully informed.⁸³ This formulation is ambiguous, however. On one interpretation, it refers to what a person would choose if she were fully rational and fully informed, with no consideration given to the fact that she is not in actuality fully rational and fully informed. To see the im-

80. *Cf. Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

81. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (articulating "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

82. *See, e.g., Harsanyi, supra* note 16, at 55 (insisting that "social utility must be defined in terms of people's true preferences rather than in terms of their manifest preferences"); *see also* KAPLOW & SHAVELL, *supra* note 3, at 23 (observing that "if individuals do not understand how situations affect their well-being," calculations of well-being should be based on "what they would prefer if they correctly understood how they would be affected").

83. *See* KAPLOW & SHAVELL, *supra* note 3, at 23; Harsanyi, *supra* note 16, at 55.

plications of this position, consider, again, the case of Jones and the three possible free speech rules, and imagine that the following situation obtains: although Jones would actually choose the Bad Consequences rule if asked, she would do so based on a miscalculation of likely effects; if she were fully informed and fully rational, she would see that the Advocacy of Imminent Illegality Rule would best satisfy her fully informed and fully rational preferences.

If dispositive weight is given to what Jones would choose if fully rational and informed, with no adjustment for the fact that she is not fully rational and informed, adoption of the Advocacy of Imminent Illegality Rule is the outcome that would maximally promote the satisfaction of Jones's preferences. On this interpretation, however, satisfying Jones's "informed preferences" could not only frustrate her actual or uninformed preferences, but also make her very unhappy. If the Advocacy of Imminent Illegality Rule were adopted, we can imagine that Jones would suffer anger and anxiety, due to her misplaced fear of the consequences. Indeed, in light of this anger and anxiety, we can imagine that she would be unhappier under the Advocacy of Imminent Illegality Rule than she would be under the Bad Consequences Rule that she would actually choose if asked. If, however, satisfying Jones's "informed preferences" can entail both denying Jones what she would actually choose and making her unhappier than she would be if she got what she would actually choose, it seems plain that a conceptual gap exists between a person's well-being (as thus defined) and what a person could rationally value most. In a case of this kind, a person could rationally choose to have her actual choice respected, with the consequence that she would be happier, rather than to be given what she would want if she were more rational and better informed than she actually is.

Another interpretation would obviate this objection. According to it, to satisfy a person's fully informed and rational preferences essentially means to give a person what she would want if she were fully informed and fully rational and if, in that state, she discounted for the fact that she is not in actuality fully informed and fully rational. On this interpretation, it is relevant that Jones would choose the Advocacy of Imminent Illegality Rule if she were fully informed and fully rational, but it is also relevant that she would experience anger and anxiety if that rule were adopted. Under this interpretation, we can thus imagine that although Jones would actually choose the Bad Consequences Rule, and although she would choose the Advocacy of Imminent Illegality Rule if she were perfectly informed and rational, the rule that would best satisfy her partially mistaken and conflicted preferences is the Clear and Present Danger Rule.

Although this is not a wholly implausible interpretation of preference satisfaction or of well-being, it has startlingly reductionist implications if taken as a measure of what a rational person would always

value most. According to this view, human agency in choosing does not matter for its own sake, but only insofar as agency is valuable in getting preferences satisfied. Indeed, it is little exaggeration to say that this conception reflects a view of human beings largely as engines for the registration of preference satisfaction.⁸⁴ The reductionist implications of this interpretation of preference satisfaction make me doubtful that preference satisfaction, as thus defined, captures all that people either do or ought to value.

Return to the example of the three possible free speech rules. Now, however, imagine that Jones's actual choice is the Advocacy of Imminent Illegality Rule. I believe that she might rationally adhere to this choice even if she received and credited omniscient advice that the Bad Consequences Rule, rather than the Advocacy of Imminent Illegality Rule, would best promote the satisfaction of her preferences over the course of her life. We can plausibly imagine Jones reasoning as follows: if the Bad Consequences Rule were adopted, the society would be well-ordered and tame, and over time she would develop a set of increasingly conventional preferences that would be extremely well satisfied.⁸⁵ When present and future preferences are both taken into account, she might therefore achieve greater overall preference satisfaction if her current preference for the Advocacy of Imminent Illegality Rule were frustrated and if she developed new, more readily satisfiable preferences in the future. Indeed, Jones recognizes (we may imagine) that her possible future preferences would be so well satisfied that she would later agree that the decision to adopt the Bad Consequences Rule was the best one for her. Nonetheless, Jones would currently choose the Advocacy of Imminent Illegality Rule because, looking to her own future, she would rather realize a normative ideal, leading an intellectually challenged and challenging life, than achieve the greatest possible quantum of preference satisfaction over the course of her life.⁸⁶

Under these circumstances, there is a clear distinction between what Jones might rationally choose and what would best promote the fulfillment of her preferences over the course of her life. Quite imaginably, Jones would rationally choose something other than the maximal satisfaction of her "actual preferences . . . for so long as they remain in existence and [her] new ones after [her] preferences have

84. This view is also startlingly paternalistic, at least in the context of a theory committed to the view that "[t]he 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." KAPLOW & SHAVELL, *supra* note 3, at 421-22.

85. On adaptive preference formation, see ELSTER, *supra* note 23, at 109-40.

86. Cf. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 59-60 (1993) (describing a person's concern "about the sort of person she will become" as "not a welfare consideration," but nonetheless one that is capable of motivating rational choice).

changed.”⁸⁷ To borrow again from Mill, she might rather live like “Socrates dissatisfied than a fool satisfied.”⁸⁸

It might be objected that the imagined circumstances of Jones’s choice are peculiar, involving a narrow question about how a preference-satisfaction conception of well-being ought to deal with metapreferences, or even more particularly with potential collisions between what R.M. Hare calls “now-for-then” and “then-for-then” preferences.⁸⁹ But the issue raised by a person’s concern about the kind of person she wants to be cuts deeper, revealing both a conceptual and a psychological gap between maximal preference satisfaction (as a measure of well-being) and what people could rationally value or choose.

This gap is important. If well-being (defined substantively as maximal preference satisfaction) is not the only thing that rational people would value, and especially if it need not be what rational people would always value above all else, then a theory that diminished everyone’s well-being should not be viewed as necessarily unacceptable on that ground. It becomes important to ask whether any particular non-welfarist theory gives people, instead of increments of welfare, something that they might actually and rationally choose instead.

B. *Welfare Economics and Outcomes That Nobody Would Choose*

In developing my argument so far, I have not denied Kaplow and Shavell’s central logical claim: adoption of a moral theory that weighs considerations other than well-being could result in the reduction of some people’s, or in extreme cases everybody’s, utility.⁹⁰ But if well-being is distinguished from what people might actually and rationally choose, as I have argued that it should be, then a symmetrical objection becomes available against welfare economic theories that consider nothing but well-being as defined by a substantive measure: a theory that considered only well-being (defined substantively as an experiential state or as preference satisfaction, for example) could imaginably dictate the imposition of legal rules contrary to those that literally everyone, except the dictator herself, would actually and rationally choose.

Imagine, for example, that a question arises about how broadly to define freedom of speech and religion. Imagine further that recognition of a broad freedom would reduce everyone’s happiness or overall

87. KAPLOW & SHAVELL, *supra* note 3, at 418.

88. MILL, *supra* note 65, at 9.

89. See HARE, *supra* note 70, at 101-02.

90. See KAPLOW & SHAVELL, *supra* note 3, at 52-58 (developing this argument).

level of preference satisfaction in light of the contingently prevailing conditions and distribution of psychological attitudes in a particular society. For example, the more people heard or learned about what others thought, the unhappier or more frustrated everyone might grow, and the overall level of everyone's preference satisfaction might diminish.⁹¹ Even on these suppositions, members of the imagined society might reasonably choose a broad definition of protected speech. To echo Mill again, they might rationally think it better to live like "Socrates dissatisfied than a fool satisfied."⁹²

Nor is this the end of the difficulty for Kaplow and Shavell's conception of welfare economics. As I argued above, Kaplow and Shavell employ two conceptions of well-being. They embrace a version of welfare economics that requires interpersonal comparisons of utility and, accordingly, demands the adoption of a substantive conception of well-being (such as happiness or preference satisfaction) that will permit interpersonal comparisons. In criticizing rights-based theories, however, they appear to employ an ordinal definition under which people are better or worse-off depending on their personal rank ordering of states of affairs. If I am right that welfare economics, using one of the most plausible *substantive* measures of well-being, could sometimes dictate legal rules that literally nobody would choose, then Kaplow and Shavell's preferred approach stands guilty of precisely the same charge that they lodge against fairness theories: it risks reducing everyone's well-being as defined by an *ordinal* conception, reflecting each person's rank ordering of possible states of affairs. Under an ordinal measure of well-being, each might think herself worse-off if denied what she would actually and rationally choose so that her happiness could be increased or the long-term satisfaction of her preferences could be maximized (and her well-being thus enhanced under a substantive measure).

Against these arguments, it might again be objected that if people would choose to live like Socrates, dissatisfied, then being dissatisfied must be what best satisfies their preferences. But as long as well-being and preference satisfaction are defined in substantive terms, this mildly paradoxical claim founders for reasons that I have discussed already. People might recognize that if they began to live like fools, they would gradually acquire fools' preferences, which would then be better satisfied than their Socratic preferences ever could be. If so, they could rationally choose not to have their preferences maximally satisfied.⁹³

91. See ELSTER, *supra* note 23, at 133-36 (developing a similar example as a criticism of utilitarianism).

92. MILL, *supra* note 65, at 9.

93. Alternatively, a defender of the preference-satisfaction approach might argue that satisfying people's preferences just means giving people what they would choose for

Once it is recognized that welfare economic analysis could dictate results contrary to what literally everyone would choose, Kaplow and Shavell's principal negative argument against fairness theories collapses. Yes, fairness theories could imaginably make everyone worse-off (under an ordinal measure of well-being), but so could welfare economics. The choice between a fairness and a welfarist theory must be made on some other ground.

II. WELL-BEING AND EX ANTE CONTRACTS

In contending that well-being should be the sole concern in the design of legal rules, Kaplow and Shavell rely on a positive argument, not just the negative argument that fairness-based approaches could diminish everyone's well-being. According to Kaplow and Shavell, if people did not know their positions in society, they would always choose legal rules based solely on their anticipated well-being.⁹⁴ In the view of many analysts, this means that rational contractors, *ex ante*, would always opt for the rule structure likely to produce the highest average utility.⁹⁵

Without rehearsing familiar debates about this issue, I would make just two points. First, in order to assess what weight *ex ante* contractors would attach to well-being, it is crucial to know how well-being is defined. If, for example, well-being were defined in terms of happi-

themselves if fully informed and rational. In essence, this argument attempts to retreat from a substantive to an ordinal conception of well-being, under which each person is deemed better-off whenever she moves from a state of affairs that she ranks lower to one that she would choose instead. As I have emphasized, however, the ordinal conception of well-being that is employed by this test is not adequate for the welfare economic analysis championed by Kaplow and Shavell. For good reason, their version of welfare economics calls for inter-personal comparisons of well-being, which in turn demand the kind of common metric that only a substantive conception of well-being can provide. A purely ordinal conception of well-being would also make it impossible to say that a person could be made better-off if her preferences were changed, so that they could be more fully satisfied, even if the person does not currently wish her preferences changed — notwithstanding the assertions of Kaplow and Shavell that people's well-being could sometimes be improved if their preferences were altered. See KAPLOW & SHAVELL, *supra* note 3, at 416-17 (discussing scenarios in which people would be better-off if their preferences were altered).

In addition, as I have argued already, this view would make it difficult if not impossible to draw the sharp line that welfare economists wish to draw between well-being and fairness-based theories, at least in a world in which anyone values (a conception of) fairness: as long as even a single theorist would rationally choose to live under a legal regime implementing her views about fairness, it could not be said that that regime made everyone worse-off, because the theorist herself would have to be viewed as better-off.

94. See *id.* at 442 (“We do not see a persuasive affirmative argument for an *ex post* view that would trump policies that maximize individuals’ well-being *ex ante* — policies that have in fact received individuals’ consent or that would receive it [in an *ex ante* bargaining situation].”).

95. See, e.g., Harsanyi, *supra* note 16, at 46; see also KAPLOW & SHAVELL, *supra* note 3, at 442 (asserting that *ex ante* contractors would choose policies “that maximize individuals’ well-being *ex ante*”).

ness, rational ex ante contractors would not necessarily prefer rules exclusively promoting happiness and, for example, according no independent significance to opportunities for the free development and use of intellectual and moral faculties. Nor would such contractors necessarily choose exclusively to maximize preference satisfaction, insofar as there is a difference between satisfying people's preferences and giving them what they would rationally choose for themselves.

It is more plausible, I think, to imagine that rational ex ante contractors, if charged to select general principles of social justice (in the way that Rawls, for example, imagines),⁹⁶ might aim solely to provide themselves with the most attractive bundle of what Rawls calls primary goods⁹⁷ — a rubric encompassing basic “rights and liberties, opportunities and powers, income and wealth.”⁹⁸ Within Rawls's framework, “primary goods are social background conditions and all-purpose means generally necessary for forming and rationally pursuing a conception of the good.”⁹⁹ He says explicitly, however, that “the share of primary goods that citizens receive is not intended as a measure of their psychological well-being.”¹⁰⁰

As I shall emphasize in Part III, I do not believe that principles of social justice could be generated solely through instrumentally rational, self-interested calculation. At least some moral principles must be accepted as the provisional starting point for further moral thought. My point for now is only that within the kind of framework that Rawls imagines, the design of which reflects a number of moral commitments,¹⁰¹ rational contractors would not necessarily choose to promote a substantive conception of well-being above all else.

Second, it is far from obvious how much moral significance attaches to imagined ex ante contracts concerning particular legal rules when the totality of the surrounding rule structure could not also be justified by a hypothetical ex ante contract. To be concrete, I doubt very much that the legal rule structure currently prevailing in the United States could be justified in its entirety by appeal to what rational contractors would unanimously choose under fair and equal bargaining conditions. Although I obviously cannot address these mat-

96. See JOHN RAWLS, A THEORY OF JUSTICE 11-17 (1971) (defining justice in terms of principles that would be unanimously agreed to by parties “in an initial situation that is fair”).

97. *See id.* at 92.

98. *Id.*

99. John Rawls, *Social Unity and Primary Goods*, in UTILITARIANISM AND BEYOND, *supra* note 16, at 159, 169 [hereinafter Rawls, *Social Unity*].

100. *Id.* at 169.

101. *See, e.g.*, Thomas Nagel, *Rawls on Justice*, in READING RAWLS I, 8-9 (Norman Daniels ed., 1989) (arguing that Rawls's design of the so-called “original position” presupposes a theory of the good).

ters in depth, it is my strong belief that any plausible social contract resulting from fair bargaining positions would produce much greater distributive equality than currently exists. This would be true, I think, even if rational contractors opted for the legal structure likely to produce the greatest average utility (as measured, for example, by happiness or preference satisfaction). Given the plausible assumption of the declining marginal utility of money,¹⁰² I think that greater distributive equality would be mandated by the average utility principle.

If the generally prevailing rule structure and its attendant distributive inequalities could not be justified by hypothetical ex ante contract, issues arise about whether particular rules could be justified successfully in this way. To take an admittedly charged example, suppose that the question is whether capital punishment should be permitted, notwithstanding worries that some of those being executed — for sake of argument, say one percent — are innocent. Suppose further, again for sake of argument, that the death penalty is a highly effective deterrent; because of it, hundreds fewer murders occur each year than would happen otherwise. Under these hypothesized facts, rational ex ante contractors would recognize that they are less likely to be killed, except as punishment for crimes they actually commit, in a legal regime with the death penalty than in one without the death penalty. With the death penalty, there is a small chance that each will be executed by the state for a crime she did not commit. But without the death penalty, each stands a greater risk of being killed by a private citizen (who might otherwise have been deterred).

In considering whether this ex ante calculation should determine the appropriateness of capital punishment, the dramatically uneven distribution of income and opportunities is not obviously irrelevant. Those convicted of capital crimes tend disproportionately to come from disadvantaged classes, as measured by income¹⁰³ and arguably by race.¹⁰⁴ This being so, a question arises about whether it should be

102. The theory of declining marginal utility holds that “the additional satisfaction derived from an additional unit of a commodity” declines as a person consumes or acquires more of that commodity. See EDWIN MANSFIELD, *MICROECONOMICS* 75-76 (7th ed. 1991). As applied to money, the theory of declining marginal utility implies that an additional dollar gives less satisfaction to a rich person than to a poorer person. See JONATHAN BARON, *MORALITY AND RATIONAL CHOICE* 160 (1993) (characterizing the assumption of the declining marginal utility of money as “[m]ore reasonable” than alternative assumptions).

103. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 562-63 & n.35 (1995) (asserting “that persons accused and convicted of capital murder are very often the victims of poverty” and noting that “[t]he widespread poverty of capital defendants is generally accepted and has escaped much academic commentary”).

104. See Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 522-24 (1995) (summarizing various empirical studies and concluding that “the race of the defendant” is crucial in determining who is charged with and convicted of capital crimes). Perhaps the

deemed fair and acceptable to impose on persons who are disadvantaged by society's failure to live by principles that would be chosen in a fair bargaining position the further disadvantage of an elevated risk of execution, possibly as punishment for crimes they did not commit. The idea of an *ex ante* contract possesses ethical significance only as a modeling device. The underlying assumption appears to be that a rule is morally correct if it is "one which all could reasonably agree to and none could reasonably reject,"¹⁰⁵ even when the rule's actual effects on particular people become known. If this is the ultimate touchstone of moral correctness, however, I worry that an innocent, disadvantaged person who was sentenced to death could reasonably reject the provision for capital punishment on the ground that it requires her to sacrifice too much for others in a context in which others are required to sacrifice too little for her.¹⁰⁶

In presenting this concern, I do not mean to suggest that it is necessarily decisive. Although capital punishment is disproportionately visited on members of disadvantaged classes, so are capital murders. On the facts that I have hypothesized concerning the deterrent effects of the death penalty, the disadvantaged as a group would suffer more from the abolition of the death penalty, on average or as a statistical matter, than would the wealthy. But suppose that murders of and by disadvantaged persons could be prevented as effectively through full employment programs as by the death penalty, and suppose further that the disadvantaged would generally prefer full employment programs to the death penalty as a policy for the reduction of murders. This congeries of hypothesized considerations seems plainly relevant to the design of legal policy, even if not dispositive of whether the

most famous study of the effect of race in the administration of the death penalty, David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983), found that the largest race-based disparity in capital cases involved the race of the victim, not the race of the defendant. Although black defendants were 1.1 times more likely to receive a death sentence than other defendants, defendants charged with the murder of a white were 4.3 times more likely to receive capital sentences than those charged with murdering blacks. The Supreme Court rejected the argument that these statistics showed Georgia's administration of the death penalty to be racially discriminatory and thus unconstitutional in *McCleskey v. Kemp*, 481 U.S. 279 (1987). According to the Court, even if the statistics generated by the Baldus study were accurate, they failed to establish that particular decisionmakers engaged in intentional race-based decisionmaking. *See id.* at 292-93, 297.

105. T.M. Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND, *supra* note 16, at 122; cf. AMARTYA SEN, INEQUALITY REEXAMINED 18 (1992) [hereinafter SEN, INEQUALITY] (observing that Rawls's reliance on an *ex ante* bargaining situation to generate principles of justice "can be seen as providing a specific structure for determining what one can or cannot reasonably reject").

106. Cf. Scanlon, *supra* note 105, at 123 (observing that in assessing reasonable grounds for the rejection of a principle, "our attention is naturally directed first to those who would do worst under it," because "if anyone has reasonable grounds for objecting . . . it is likely to be them").

death penalty should be deemed to violate a moral or constitutional right.

In their defense of welfare economics, Kaplow and Shavell insist, probably correctly, that welfare economic analysis tends to do better than most fairness-based approaches in broadening the frame in which particular problems are analyzed.¹⁰⁷ According to them, fairness theories tend to adopt a post hoc, backward-looking perspective, ignoring opportunities to establish rules that will maximize future social welfare.¹⁰⁸ By contrast, they say, welfare economics requires analysts to consider which rule structure will make things better in the future.¹⁰⁹

Against this claim, my point is only that nearly all legal analysis — including that commended and conducted by Kaplow and Shavell — operates under framing constraints,¹¹⁰ with many contingent elements of the social, economic, and legal structure implicitly accepted as given.¹¹¹ Analysis thus proceeds on a second-best, not a first-best, basis. I agree with Kaplow and Shavell that the optimal response to distributive inequities would typically be to deal directly with distribution.¹¹² But in the absence of that response, there are inherent difficulties in second-best normative analysis, in part because decisions about what to take as “given” are irreducibly contestable. Once the inevitability of contestable framing constraints is acknowledged, the normative force of ex ante arguments attempting to justify particular rules is considerably diminished, especially insofar as those rules impose heavy burdens on those who are already among the least advantaged classes.

III. WELL-BEING, IMPERSONAL VALUE, AND CHOICE-WORTHINESS

Among the strands of argument that I have developed thus far, the most insistent has been a simple one. Although it is often assumed that

107. See KAPLOW & SHAVELL, *supra* note 3, at 49 (characterizing welfare economics as “superior” to fairness-based approaches on this basis).

108. See *id.* at 48 (asserting that assessments of fairness “are usually made from an ex post perspective”).

109. See *id.* at 49 (asserting that ex ante, welfare economic analysis “reflects a complete consideration” of factors relevant to shaping future outcomes).

110. See *id.* at 32 (“[W]hen undertaking any kind of analysis, it is often useful to focus on certain factors in order best to understand their effects, leaving other considerations aside.”).

111. See generally Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002) (discussing the crucial importance of how issues in constitutional law are framed).

112. See KAPLOW & SHAVELL, *supra* note 3, at 33 (“[W]hen legal rules do have distributive effects, the effects usually should not be counted as favoring or disfavoring the rules because distributive objectives can often be best accomplished directly, using the income tax and transfer (welfare) programs.”).

each of us values her own well-being above all else, this assumption becomes highly questionable once well-being receives the substantive content necessary to support policy analysis, including the welfare-economic calculations championed by Kaplow and Shavell. When well-being is defined substantively, a potential gap emerges between what would maximally promote people's well-being, as specified by a substantive measure, and what some people might rationally choose. In light of this gap, a rule that diminishes well-being should not be deemed necessarily unacceptable on that ground alone.

So far, however, I have not attempted to explain how or why people might rationally value goals, aims, or outcomes other than their own well-being (as defined by some substantive measure). Neither have I discussed how the notion of well-being appropriately enters into moral, political, or legal decisionmaking. Nor have I addressed the implications of individual valuation for the definition and enforcement of rights. In this Part, my aim is partly to remedy these deficiencies. My goal is not to make an independent contribution to moral and political philosophy. Much more modestly, I intend only to sketch the kind of rights-based approach that I believe coheres best with widely held beliefs about the nature of constitutional rights, to defend its assumptions in contrast with those of Kaplow and Shavell's version of welfare economics, and to demonstrate how it might respond to some of Kaplow and Shavell's barbed challenges.

I begin in Section A by identifying the foundations of moral thinking in an "impersonal" standpoint capable of furnishing distinctively moral reasons for action. The notion of a reason is fundamental in moral analysis, more so than the desire of each for her own well-being, and Section A also discusses the role of reason in making judgments of choice-worthiness. Section B distinguishes people's prudential interests in their own well-being, which I define loosely as a sequence of desirable experiential states, from other kinds of reasons for valuing other goods. It also explains why our interests in our own well-being have no categorical priority over reasons involving moral and aesthetic ideals. Section C examines the significance of personal conceptions of well-being from the impersonal perspective. It maintains that some personal goals and satisfactions matter more than others and that autonomy is a distinct, sometimes supervening value. Section D defends the idea of rights framed to promote values other than welfare. Section E offers a concluding defense of the moral methodology on which my arguments in this Part rely.

A. Foundations of Moral Thinking

As affirmed by a tradition of liberal or “impartialist” theories,¹¹³ the foundation of moral thought lies in an “impersonal standpoint” from which each of us must recognize that, objectively speaking, we are no more important than anyone else.¹¹⁴ Each of us is a conscious being, capable of thought and experiential states; we all have goals, values, and interests that give meaning to our lives. Much if not most of the time, we pursue our goals and interests with unselfconscious attention.¹¹⁵ But we can, and sometimes do, take a more distanced view of our own situation.¹¹⁶

When we adopt an impartial point of view, our own goals, values, and interests do not lose significance for us. As Thomas Nagel puts it, “[y]ou cannot sustain an impersonal indifference to the things in your life which matter to you personally.”¹¹⁷ Nonetheless, the impersonal standpoint generates distinctively moral reasons for action, grounded in the recognition that if I “matter impersonally, so does everyone” else;¹¹⁸ if some or all of my goals, values, and interests matter impartially, then so do some or all of the goals, values, and interests of others.¹¹⁹

From an impartial point of view, I thus recognize that because others’ lives matter as much as mine,¹²⁰ it would be wrong for me to

113. See generally BRIAN BARRY, JUSTICE AS IMPARTIALITY 217-33 (1995) (discussing “impartialist” theories). Kaplow and Shavell’s reliance on arguments based on hypothetical ex ante contracts, see *supra* notes 94-112 and accompanying text, reflects an implicit if not explicit appeal to the notion of an impartial perspective.

114. THOMAS NAGEL, EQUALITY AND PARTIALITY 10-11 (1991) [hereinafter NAGEL, EQUALITY AND PARTIALITY]. It is beyond my ambition here to address the challenges posed by nonimpartialist or nonegalitarian approaches, including perfectionist and virtue-based theories. See, e.g., ARISTOTLE, NICHOMACHEAN ETHICS 17 (Terence Irwin trans., 1985) (maintaining that “the human good turns out to be the soul’s activity that expresses virtue); FREIDRICH NIETZSCHE, THE WILL TO POWER § 766, at 403 (Walter Kaufmann ed., 1967) (terming it a “basic error” to “place the goal in the herd and not in single individuals”). See generally THOMAS HURKA, PERFECTIONISM (1993) (reviewing and assessing theories based on ideals of individual perfection).

115. See NAGEL, EQUALITY AND PARTIALITY, *supra* note 114, at 10 (“Most of our experience of the world, and most of our desires, belong to our individual point of view: We see things *from here*, so to speak.”).

116. See *id.* (“But we are also able to think about the world in abstraction from our particular position in it — in abstraction from who we are.”).

117. *Id.* at 11.

118. *Id.*

119. See *id.* at 13 (“[W]e are pulled toward the conclusion that what happens to anyone matters the same as if it had happened to anyone else.”).

120. See *id.* at 10-12 (noting that from an impersonal point of view everyone is as important as the self appears from a personal standpoint).

put others' lives recklessly at risk.¹²¹ I also recognize that I have reason to sacrifice some of my own goals and interests to assist those with more urgent needs.

In asserting that I have moral reasons, I use the term "reason" in a broad sense encompassing any consideration that may count in favor of an action or an assessment that an act ought (or ought not) to be done.¹²² This usage assumes that our assessments of choice-worthiness reflect and are sensitive to reasons. It rejects Hume's celebrated claim that "reason is and ought only to be the slave of the passions."¹²³ On the Humean view, which loosely supports the claim of some economists that we always act for the ultimate purpose of promoting our own well-being,¹²⁴ reason cannot tell us whether or how much we ought to value others' lives or anything else; it can only calculate how to achieve what we desire already. At a minimum, the Humean position is too strong.¹²⁵ Our desires are subject not only to criticism, but also to revision in the face of criticism.¹²⁶ My desire to behave in certain ways may diminish or even disappear if I become persuaded that my desires are cruel or debased. It might then of course be said that what is fundamental is my desire not to be cruel or debased;¹²⁷ reason simply tells me how to satisfy that desire. By no means, however, does desire, viewed as antecedent to reason, always play the fundamental motivational role that this objection assumes.¹²⁸ Reason is frequently crucial.

121. Kaplow and Shavell emphasize that attitudes such as this may be substantially or even wholly the product of evolutionary biology and social conditioning. See KAPLOW & SHAVELL, *supra* note 3, at 62-76; see also RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 33-37 (1999) (attempting to explain moral sentiments and altruistic behavior solely by reference to cultural conditioning and evolutionary biology). I do not question that the origins of our moral sentiments may lie in these sources. But we are capable of questioning our unreflective notions and determining whether they should be altered or even abandoned in light of critical assessment. For further discussion of the role of critical assessment in moral thinking, see *infra* notes 125-128, 192-197 and accompanying text.

122. See T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 17 (1998) [hereinafter SCANLON, *WHAT WE OWE*] (characterizing "the idea of a reason as primitive" and capable only of circular definition according to which "to be a reason for something" is to be "a consideration that counts in favor of it").

123. DAVID HUME, *A TREATISE OF HUMAN NATURE* 413-18 (L.A. Selby-Bigge ed., Oxford Univ. Press 1985) (1739).

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

125. See SCANLON, *WHAT WE OWE*, *supra* note 122, at 20 (noting that the presupposition of giving someone advice is that the person can think about what she has reason to do).

126. See NAGEL, *supra* note 2, at 142 (noting that people act and form desires "for reasons, good and bad").

127. See SCANLON, *WHAT WE OWE*, *supra* note 122, at 54-55 (discussing efforts to defend a "desire model" of human behavior by "appeal to the idea of second-order desires").

128. See *id.* at 41-50 (asserting the fundamentality of reasons, not desires, in motivating and justifying conduct).

Suppose I see a student suffering acute emotional distress, note that I could likely help her at only modest inconvenience to myself, and pause to consider what to do. In a case such as this, it is surely conceivable that I might consider what course of action would best promote my own happiness or satisfaction. But if I would derive happiness or satisfaction from helping the student, it would be because I see this as what I ought to do. As Thomas Scanlon has written, “[f]rom a first-person point of view, the things that contribute to (one’s own) well-being are obviously important, but the concept of well-being plays little role in explaining why they are important.”¹²⁹ To put the point somewhat summarily, we do not typically value goods or activities, nor do we choose them, because they contribute to our well-being. Rather, goods and activities contribute to our well-being because we value them.¹³⁰

But why should I value the act of helping someone in distress, or think it one that I ought to do? To respond to this question, I must cite reasons for thinking the act choice-worthy. I might say, for example, that for anyone to be in great and undeserved distress is objectively bad and that a person ought to take steps to relieve great and undeserved distress whenever she can do so at only modest inconvenience to herself.¹³¹ This asserted reason is an impersonal one. It would apply to anyone in a similar situation, not just to me.¹³²

Someone else might disagree with my reasoning. The imagined interlocutor might claim that I have no reasons unrelated to what is good for me, or she might maintain that my moral obligations are broader than I believe and that I have impersonally compelling reasons to attempt to relieve distress even when the inconvenience to me would be very great.¹³³ In either case, we would have to press the inquiry further, with each of us testing the other’s proffered arguments. In the ensuing discussion, reasons, not utility or well-being, would function as the fundamental metric of moral assessment.¹³⁴ As Nagel puts it, “[i]f we think at all, we must think of ourselves, indi-

129. *Id.* at 142.

130. *See id.* at 40 (concluding that “we should not take ‘desires’ to be a special source of motivation, independent of our seeing things as reasons”).

131. *Cf.* NAGEL, *supra* note 2, at 144 (“The objective badness of pain, for example, is not some mysterious further property that all pains have, but just the fact that there is reason for anyone capable of viewing the world objectively to want it to stop.”).

132. *See* SCANLON, WHAT WE OWE, *supra* note 122, at 73 (discussing “the universality of reason judgments”).

133. This is the utilitarian view, according to which each person should do whatever would maximize overall utility, without any special regard for herself or her personal projects.

134. *See* SCANLON, WHAT WE OWE, *supra* note 122, at 4 (characterizing “judgments of right and wrong as judgments about reason and justification”).

vidually and collectively, as submitting to the order of reasons rather than creating it."¹³⁵

B. *Well-Being and Choice-Worthiness*

When the personal and the impersonal standpoints are both acknowledged, the notion of well-being is typically linked with the personal point of view.¹³⁶ This linkage is warranted in one important respect: the well-being of any particular person is relative, at least in part, to her particular goals, values, and interests.

In discussing personal goals, values, and interests, I cannot pause to examine all the diverse kinds of things that we rationally value, the diverse ways in which we value them,¹³⁷ or our diverse reasons for doing so.¹³⁸ Suffice it to say that there are irreducibly many valuable goods, including "objects and their properties (such as beauty), persons, skills and talents, states of character, actions, accomplishments, activities and pursuits, relationships, and ideals."¹³⁹ In a short human life, none of us can address our attention to everything of value, nor can we pursue every valuable activity to the fullest extent. The need for choice is endemic to the human condition.

The diversity of goods and the variety of ways in which we can value them underlay my repeated arguments in Part I that it is difficult to give a plausible substantive account of well-being that reflects all of what everyone might reasonably judge most choice-worthy. For example, if well-being is defined as a desirable experiential state, we might rationally value freedoms, or opportunities, or challenges more than that experiential state. If well-being is defined as preference satisfaction, we might value the pursuit of particular goals or ideals more than having our preferences satisfied as fully as possible over the course of our lives.

135. See THOMAS NAGEL, *THE LAST WORD* 143 (1997) [hereinafter NAGEL, *LAST WORD*]. Judge Posner appears to dispute this claim when he emphasizes what he takes to be intractable moral disagreement as a ground for doubting both the validity of any moral theory with objectivist pretensions and the capacity of reason to resolve ultimate claims of right. POSNER, *supra* note 121, at 10, 17-29. But Judge Posner acknowledges that "[a]djudication is a normative activity," frequently requiring "normative reasoning," see *id.* at 112-13, and he advances a normative theory — which he calls "pragmatism" — prescribing the kind of normative reasoning in which judges ought to engage. See *id.* at 240-65. His arguments for pragmatism are framed for reasoned assessment; he assumes the competence of reason to assess the validity of both of his claims and those that he debunks.

136. See Scanlon, *supra* note 1, at 96 (noting this association in leading accounts).

137. See SCANLON, *WHAT WE OWE*, *supra* note 122, at 99 ("[U]nderstanding the value of something is not just a matter of knowing *how valuable* it is, but rather a matter of knowing *how to value* it.").

138. See *id.* at 98 (asserting that "[t]here does not seem to be a single, reason-providing property that is common to all" valued goods).

139. *Id.* at 95.

To some, it appears natural and even irresistible to assume that for each of us there is a single highest good — our well-being, or what is best for us personally — that a fully informed and rational person would always choose.¹⁴⁰ But the diversity of goods and the diversity of the ways in which we value them render this view implausible. We may value certain kinds of music because they make us feel happy, but to adapt Bernard Williams's telling phrase, anyone who thinks he should be a loving spouse for the sake of his own happiness or well-being has "one thought too many."¹⁴¹

As I suggested in Part I,¹⁴² a fully informed and rational person might choose among differently valuable goods or activities on alternative bases that resist amalgamation.¹⁴³ To cite just two among many possible grounds for choice, a rational person might base her decision about what profession to pursue, for example, on loosely prudential considerations, aiming to achieve the most happiness or greatest sum of satisfaction over her life as a whole.¹⁴⁴ Or she might pursue a normative ideal, opting not for the promise of happiness or even satisfactions but for what she deems choice-worthy on moral or aesthetic grounds.¹⁴⁵ Doing what is adjudged choice-worthy in this sense brings no guarantees of satisfaction. The person who chooses to try to live like Socrates may end up very dissatisfied indeed, yet still think her choice the best one.

The distinction between prudential concerns and other reasons for action grows even more stark when the impersonal point of view intrudes itself. Sometimes I experience the demands generated by the impartial point of view — for example, to render aid to others — as requiring me to suffer diminutions in my personal comfort and in the quality of my psychological experience.¹⁴⁶ Occupying the personal

140. See, e.g., BECKER, *supra* note 25, at 22-23 (equating rationality with behavior that maximizes personal utility); BENTHAM, *supra* note 65, at 100 (asserting that "pleasure is . . . the only good").

141. BERNARD WILLIAMS, *MORAL LUCK* 18 (1981).

142. See *supra* text accompanying notes 67-69, 85-89.

143. See, e.g., SEN, *COMMODITIES*, *supra* note 45, at 13 ("Whether the binary relation of choice can possibly be seen as reflecting the person's well-being must depend on the motivations that underlie choice. There is an enormous difference between choosing tea or coffee according to one's taste (and concern for personal well-being), and choosing to join, or not to join, a strike, taking note, *inter alia*, of obligations to others; or working hard or giving to charity out of sympathy or commitment." (footnotes omitted)).

144. See, e.g., HARE, *supra* note 70, at 105 (characterizing it as a "requirement of prudence . . . that we should always have a dominant or overriding preference now" for the satisfaction of our own current and future preferences).

145. See Sen, *Rational Fools*, *supra* note 1, at 329 (discussing "commitment" as a basis for choice distinct from personal well-being).

146. According to Nagel, the master problem of moral and political theory is to find a way to reconcile "the inner conflict" experienced by people who simultaneously occupy both

point of view, I may feel worse-off, not better-off, after making some of the small sacrifices that I sometimes make.¹⁴⁷ Yet I believe that I have moral reason to make those sacrifices.¹⁴⁸ I feel admiration and sometimes awe when I note the much larger sacrifices of comfort, health, and even life that others sometimes make in order to promote such impersonal values as the health, lives, and liberty of strangers.¹⁴⁹

Once the distinction between prudence and ideals of moral or aesthetic choice-worthiness is recognized,¹⁵⁰ I believe that two conclusions follow. First, the bare idea of rationality establishes no lexical priority among prudential reasons and reasons for action involving moral or aesthetic ideals.¹⁵¹ Second, as between these two possible bases for choice, the notion of well-being fits better with prudence.¹⁵² To have well-being is to be well;¹⁵³ and our interest in being well, both physically and psychologically, is precisely what moral and aesthetic ideals sometimes demand that we should sacrifice. It would diminish moral and intellectual clarity, not enhance it, to insist that a person who died trying to save another, or to end an unjust practice, or to

impersonal and personal standpoints "that is acceptable to everyone in light of the universality of that conflict." NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 114, at 17-18.

147. This is a contingent psychological claim. I do not mean to deny that fulfilling perceived moral duties is sometimes or perhaps even typically psychologically rewarding.

148. See NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 114, at 85 ("Impartiality provides quintessentially agent-neutral reasons — reasons to want something independent of your point of view.").

149. Cf. GRIFFIN, *supra* note 60, at 160 ("It is not that death could never be better than dishonour, but rather that it is hard any longer to see the relevant notion of dishonour solely under the heading of prudence.").

150. In arguing that a distinction exists between personal goals and projects, on the one hand, and the felt dictates of impersonal reason, on the other, I do not mean to deny that the border separating the two may blur. Admittedly, some of the goals and projects most fervently embraced from a personal standpoint may involve the well-being of others. It may be a personal goal to advance the interests of one's children or colleagues, see, e.g., NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 114, at 109-10 (noting "the special interest people take in their relatives, especially their children," and viewing this interest as being in partial tension with the dictates of an impersonal standpoint), or, at the extreme, to ensure justice — as defined from the impersonal point of view — for a particular group. But blurry edges do not collapse the distinction. The impersonal standpoint generates demands, and reasons for action, that call for the sacrifice of personal well-being.

151. See SUMNER, *supra* note 60, at 188-89 (noting that practical reason must resolve conflicts between ethical and other values and that "[p]luralism . . . seems to be the right story about practical rationality"); cf. HENRY SIDGWICK, *THE METHODS OF ETHICS* 508 (7th ed. 1907) (asserting that in cases of "conflict between self-interest and duty, practical reason, being divided against itself, would cease to be a motive on either side" and that "the conflict would have to be decided by the comparative preponderance of one or other of two groups of non-rational impulses").

152. See GRIFFIN, *supra* note 60, at 72 ("If we are interested . . . in the conception of well-being needed by moral theory, it seems that it must be the one supplied by the prudential value theory.").

153. See SEN, *INEQUALITY*, *supra* note 105, at 39 ("The well-being of a person can be seen in terms of the quality (the 'well-ness,' as it were) of the person's being.").

make the world a safer place was really just pursuing her own well-being.¹⁵⁴ What is more, as I argued in Part I,¹⁵⁵ measurements of a person's well-being solely by reference to her own ordinal preference rankings assumes a conception of well-being under which interpersonal comparisons are impossible.

In view of these considerations, although I do not have a fully worked out conception of well-being, I conclude that the best substantive conception will be a loosely prudential one. I shall therefore use the term accordingly, in the remainder of this Part, as I attempt to sketch the relation between well-being and other values. Roughly speaking, when I say "well-being," I shall hereafter mean to refer to a sequence of diverse but desirable experiential states, including, but not limited to, happiness and satisfaction, over the course of a complete life. In these terms, people's well-being is enhanced insofar as they experience more desirable experiential states, or a higher average level of experiential quality, over their lives.

I emphasize, however, that when I use the term "well-being" in this way, I do not mean to imply that each of us would always regard the promotion of our own well-being as the most important or choice-worthy aim, even for us. In deciding what we have most reason to do, all things considered, we sometimes have to weigh our interests in our own well-being against other considerations that bear on choice-worthiness. These include both impersonally defined moral obligations and personal ideals of the kind of life we think most worth leading, even when attempting to meet those ideals would render us unhappy or otherwise unsatisfied.

C. *Personal Conceptions of Well-Being from the Impersonal Point of View*

Because the impersonal point of view does not simply efface the personal point of view, among the greatest challenges for moral thinking is to achieve a reconciliation or accommodation of the personal and impersonal standpoints.¹⁵⁶ As a psychological matter, few if any of us could accept that others' interests, projects, and well-being have as much claim on us as our own.¹⁵⁷

154. See SEN, *COMMODITIES*, *supra* note 45, at 13 (noting that the equation of well-being with choice fails to acknowledge crucial differences in motivations for choice).

155. See *supra* text accompanying notes 51-55.

156. See NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 114, at 15 (terming "conflict" between the personal and impersonal standpoints "a further problem for ethical and political theory — a new set of data for which a theory must be constructed").

157. See *id.* at 18 (noting that "the special concern with how one's own life goes cannot be abolished" and suggesting that moral and political theory must accommodate this psychological reality); cf. RAWLS, *supra* note 96, at 176-78 (observing that principles of justice should be selected partly in light of "general facts of moral psychology" indicating that it is

According to utilitarian thinkers, when we attempt to occupy an impersonal standpoint, what we discover is simply a reason to treat others' well-being, as they understand it, as being as important as our own.¹⁵⁸ Kaplow and Shavell advance a very similar claim: legal and social policy should be based exclusively on calculations of social welfare, with social welfare defined as a positive, increasing function of the well-being of individuals.¹⁵⁹ But this formulation is at once too broad and too narrow.

It is too broad because it fails to recognize the inherently moral, and thus judgmental, character of the impersonal standpoint. When we assume an impersonal point of view, we accept that there are limits on what we can reasonably demand of others.¹⁶⁰ By the same token, we adopt a perspective from which to assess what others can reasonably demand from us, from each other, and from the legal system. To some extent, impersonal moral thinking may incorporate the goals and interests that we (and others) embrace from a personal standpoint.¹⁶¹ Nonetheless, there is no reason to assume that impersonal moral thinking will simply absorb everyone's goals and interests or make the promotion of individual well-being (as I have now loosely defined it) its undifferentiated goal.

If a person is starving or suffering from a physical injury, she can reasonably demand that others come to her aid, as long as they can do so without too much cost or risk to themselves. From the impersonal point of view, her life and her freedom from physical agony possess objective value, as do everyone else's. Matters would be different, however, if a person wanted help in afflicting others on the basis of race or religion, even if such assistance would bring her great psychological gratification and even if she would prefer help in that cause to being given a decent diet. In the case of an antisocial preference such as this, it is not merely that others' interests in avoiding affliction

sometimes difficult or impossible for people not to value their own interests over the good of the community).

158. See SIDGWICK, *supra* note 151, at 492 (“[A] Utilitarian must hold that it is always wrong for a man knowingly to do anything other than what he believes to be most conducive to Universal Happiness.”); WILLIAMS, *supra* note 141, at 14 (“A man who has . . . a [central] project will be required by Utilitarianism to give up what it requires in a given case just if that conflicts with what he is required to do as an impersonal utility-maximizer . . .”). See generally BARRY, *supra* note 113, at 217-33 (discussing utilitarianism as an “impartialist” theory positing a general obligation to promote the general welfare).

159. See KAPLOW & SHAVELL, *supra* note 3, at 24 (“[S]ocial welfare is postulated to be an increasing function of individuals' well-being and to depend on no other factors.”).

160. See NAGEL, EQUALITY AND PARTIALITY, *supra* note 114, at 37 (noting that “[e]ach of us has a primary attachment to his own personal interests, projects, and commitments, but this is restrained by our occupation of the impersonal standpoint . . .”).

161. See *id.* at 65 (asserting that from the impersonal point of view we “take as our preliminary guide to the value” of what happens to each person “the value which it has from” that person's point of view).

would carry decisive weight in the moral balance. Even if those interests could be put to one side, a personal goal (or even ideal) of harming others would exert no morally colorable claim on others' time, energy, or resources.¹⁶² From an impersonal point of view, some personal goals and interests matter more than others, while others matter not at all, and not merely because of the extent to which they contribute to a person's experienced happiness, satisfaction, or well-being.¹⁶³

The notion that public policy should be based solely on calculations of well-being is also too narrow. From an impersonal point of view, we are not merely sentient creatures, capable of achieving experiential states or having our preferences satisfied; we are moral agents, able to develop and pursue independent conceptions of what is good and choice-worthy. Partly independent of our well-being are our interests in exercising moral powers of valuation and choice.¹⁶⁴ Our lives and status are demeaned if we lack opportunities as well as the resources to make critical judgments about the kind of people we want to be and the kinds of lives we ought to lead, even if our choices make us less happy or satisfied than we might otherwise have been.¹⁶⁵ This, I believe, is the premise underlying the familiar assumption that rights of speech and religion, in particular, have some capacity to resist the claims of individual well-being and social welfare. We value for ourselves, and we owe to others, the basic liberties necessary to develop and pursue independent conceptions of choice-worthy lives.¹⁶⁶

I should emphasize that although my stance here reflects what is commonly affirmed from a personal standpoint, it also claims to be an objective one, grounded in an impersonal point of view, and thus not dependent on what most members of any particular society would

162. Cf. T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 659-60 (1975) [hereinafter Scanlon, *Preference and Urgency*] (asserting that "[t]he fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat (even assuming that the sacrifice required of others would be the same)").

163. See NAGEL, *supra* note 2, at 167-71 (so arguing); see also BARRY, *supra* note 113, at 160-88 (discussing prominently asserted grounds for denying that some values or conceptions of the good provide impartial reasons).

164. See SCANLON, WHAT WE OWE, *supra* note 122, at 105-06 (asserting that "appreciating the value of human life must involv[e] recognizing and respecting" the capacities to "select among the various ways there is reason to want a life to go" and "to govern and live that life in an active sense").

165. See Amartya Sen & Bernard Williams, *Introduction to UTILITARIANISM AND BEYOND*, *supra* note 16, at 1, 13 (distinguishing the value of the capacity to choose from the value of the thing chosen).

166. This, roughly, is the idea underlying Rawls's claim that the best measure of social justice is the distribution of primary goods, not well-being or utility as each person conceives it. See *supra* notes 96-100 and accompanying text (discussing primary goods).

deem choice-worthy.¹⁶⁷ Even if all members of some society would choose to live like Mill's fools, satisfied, and to stifle free speech in service of their aims, freedom of speech would retain its impersonal value. As I have noted already, among the reasons that currently prevailing preferences cannot by themselves establish what is right is that, from an impersonal point of view, the interests of unborn generations also count.¹⁶⁸ Because the existence of unborn generations is contingent, so are their utility functions. Predictions might be possible, but more is at stake. Even if (as is imaginable) people brought up without freedom of speech would value it less than people born into a free society, and even if the current generation would prefer to limit or abandon freedom of speech, the living would owe freedom of speech to those who will come after, to enable them to form their own, informed, independent ideals.¹⁶⁹

In claims such as this, Kaplow and Shavell believe they catch the scent of moral elitism and potential tyranny.¹⁷⁰ But tyranny by the majority, or by social utility functions, is as conceptually possible as tyranny by self-styled moral elites. Recall my argument in Part I¹⁷¹ that the maximization of certain substantive conceptions of well-being, such as happiness or preference satisfaction, could imaginably produce outcomes that literally no one would choose.¹⁷² In principle, Kaplow and Shavell are as open to charges of potential tyranny as those against whom they lodge the accusation.¹⁷³ The charges are empty in

167. The relevant sense of objectivity may be either stronger or weaker. Cf. Scanlon, *Preference and Urgency*, *supra* note 162, at 658 (defining "an objective criterion" as one "that provides a basis for appraisal of a person's level of well-being which is independent of that person's tastes and interests" even if the criterion is "socially relative").

168. See generally PARFIT, *supra* note 61, at 351-441 (discussing myriad problems presented in attempting to fit unborn generations into an acceptable moral framework).

169. I do not mean to suggest that the formation of ideals could ever be entirely unconditioned. See NAGEL, *supra* note 2, at 119 (arguing that critical reflection can never wholly transcend "the unchosen sources of our most autonomous efforts" and that the critical perspective that "seems to offer greater control also reveals the ultimate givenness of the self"). The "ultimate givenness of the self" does not make autonomy a nonsensical ideal, but it does suggest that "autonomy" — insofar as the concept is used in a descriptive sense — "is a matter of degree." Fallon, *Two Senses*, *supra* note 49, at 877.

170. See KAPLOW & SHAVELL, *supra* note 3, at 421-22 ("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.").

171. See *supra* text accompanying notes 92-93.

172. See generally Thomas M. Scanlon, *The Moral Basis of Interpersonal Comparisons*, in INTERPERSONAL COMPARISONS, *supra* note 53, at 17, 43 (developing a similar criticism of an approach under which policies should be based on people's hypothetical "fully informed" references).

173. See Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 125 (2002) (asserting that Kaplow and Shavell's approach would "impose . . . rules on people against their wishes on the ground that, if people thought it through, this is what they would want").

both cases, however, until supplied with a substantive foundation in moral argument. The identification of tyranny requires a moral baseline, and to establish a moral baseline takes moral argument. Simply to note the views, preferences, or utility functions of the majority proves nothing.¹⁷⁴

I have maintained that moral premises emerge directly from an impersonal point of view that each of us is capable of adopting. This is admittedly a contestable claim. As should now be clear, however, it is not a claim that Kaplow and Shavell can reject, at least when put in general terms: they too rely on an analogue of the impersonal point of view, as suggested by their appeals to what rational parties would choose *ex ante*.¹⁷⁵ They differ from me not in denying that there is a distinctively moral perspective, characterized by its impartiality, but in their assessment of what emerges from that perspective. According to them, the premise emerges that the sole and ultimate moral good lies in the promotion of the general welfare, as defined by currently prevailing tastes or preferences.¹⁷⁶ I have argued that other values matter too.

174. See, e.g., Harsanyi, *supra* note 16, at 61 (acknowledging that “the concept of rationality alone” will not “yield a useful ethical theory” in the absence of “a commitment to a humanitarian morality”).

Mill once argued that the moral significance of the general well-being followed as a consequence of each person’s nonmoral desire for her own well-being: “[E]ach person’s happiness is a good to that person, and the general happiness, therefore, a good to the aggregate of all persons.” MILL, *supra* note 65, at 33. But this reasoning is fallacious. As Sidgwick objected, “an aggregate of actual desires, each directed towards a different part of the general happiness, does not constitute an actual desire for the general happiness, existing in any individual.” SIDGWICK, *supra* note 151, at 388.

On the surface, it might appear that some contractualist moral theories attempt to derive morality from principles of purely rational, self-interested choice. See, e.g., DAVID GAUTHIER, *MORALS BY AGREEMENT* 9 (1984) (attempting to derive morality from “the application of the maximizing conception of rationality to certain structures of interaction” by arguing that “[a]greed mutual constraint is the rational response to these structures”); RAWLS, *supra* note 96, at 12-14 (defining justice by reference to principles that would be chosen by “rational and mutually disinterested” parties, “conceived as not taking an interest in one another’s interests,” and with their rationality “interpreted as far as possible in the narrow sense, standard in economic theory”). But for unanimous, self-interested agreement on principles of justice to be even plausibly attainable, fair or ideal choice conditions need to be specified. There is no way to generate those conditions without reliance on morally shaped notions of fairness or reasonableness. See NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 114, at 39 (observing that what a party to a hypothetical contracting situation could reasonably reject as insufficiently responsive to her own goals or interests is “a moral issue ‘all the way down’”).

175. See KAPLOW & SHAVELL, *supra* note 3, at 442 (“We do not see a persuasive affirmative argument for an *ex post* view that would trump policies that maximize individuals’ well-being *ex ante* — policies that have in fact received individuals’ consent or that would receive it [in an *ex ante* bargaining situation].”).

176. See *id.* at 26 (“[T]o adopt welfare economics is to adopt the general moral position that one should be concerned, positively and exclusively, with individuals’ well-being.”).

Kaplow and Shavell assert that there is an affinity between their arguments criticizing fairness theories and the critical arguments offered by Judge Posner, see POSNER, *supra* note 121, debunking the pretensions of what he calls “moral theory.” But if Judge Posner’s arguments were valid, they would tell equally against the moral theory offered by Kaplow and

D. Rights

Within the account that I have offered, the point of rights — in morals and to some extent in constitutional law — is to protect or promote goods and opportunities that, from an impersonal standpoint, are adjudged valuable and that are needful of protection or promotion. As Scanlon once wrote, to be persuasive a claim of moral right must generally be backed by (i) “an empirical claim about how individuals would behave or how institutions would work in the absence of this particular assignment of rights,” (ii) a value-based claim that “this result would be unacceptable,” and (iii) a further empirical claim about how “the envisaged assignment of rights will produce a different” and better outcome.¹⁷⁷

Attempts to derive constitutional rights commonly proceed on a similar basis. As I have argued elsewhere,¹⁷⁸ our constitutional practice pervasively presupposes that rights reflect “interests,” with the term “interests” representing those personal values that retain their importance from an impersonal standpoint. To provide only the sketchiest illustration, First Amendment analysis often presupposes that people have interests in being able to express themselves and in having access to information and ideas.¹⁷⁹ In some cases, however, other interests may weigh on the other side. If Jones wants to express herself to Smith by picketing outside Smith’s home, interests in privacy must also be taken into account.¹⁸⁰

The balancing of competing considerations need not occur on a case-by-case basis. We frequently get better consequences overall by laying down clear rules and abiding by them.¹⁸¹ For example, we might

Shavell, which maintains that welfare economics supplies the uniquely morally correct answers to questions of social justice. See KAPLOW & SHAVELL, *supra* note 3, at 5 (“[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 be based solely on concerns for human welfare.”).

177. T.M. Scanlon, *Rights, Goals, and Fairness*, in PUBLIC AND PRIVATE MORALITY 43, 103 (Stuart Hampshire ed., 1978). Scanlon appears subsequently to have changed his view. See SCANLON, WHAT WE OWE, *supra* note 122, at 106-07 (maintaining that considerations of right and wrong should play “a more fundamental role” in defining what we owe to each other than they are permitted to play by “consequentialism, according to which ideas of right, wrong, and obligation are made subservient to a purely teleological conception of the good”).

178. See Fallon, *supra* note 10.

179. See *id.* at 372 (noting the role of such interests in supporting the conclusion that flag burning is protected speech).

180. See *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding an ordinance barring targeted picketing of homes in light of “[t]he state’s interest in protecting the well-being, tranquility, and privacy of the home”).

181. See generally FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 135-66 (1991) (exploring the reasons for reliance on rules).

conclude that criticism of governmental policies should never be prohibitible on the basis of content unless it expressly advocates imminent violence and is likely to produce imminent violence,¹⁸² even though some criticisms of the government that receive protection under this rule may produce very harmful results. In some uses of the term, to say that someone has a "right" means that she enjoys the protection of a constitutional rule.¹⁸³

It perhaps bears emphasis that welfare economics, as championed by Kaplow and Shavell, does not preclude the possibility of either moral or constitutional rights, based on a calculation of likely consequences. But Kaplow and Shavell would restrict the consequences that matter to those involving individual well-being.¹⁸⁴ As I have argued repeatedly now, that focus is too narrow. Also important are consequences affecting opportunities to form, affirm, and pursue personal conceptions of choice-worthiness.

This is a normative claim, but it also accords with my understanding of important elements of constitutional law. Among the panoply of constitutional rights, some are best understood as protecting interests in well-being. The Eighth Amendment prohibitions against "excessive bail" and "excessive fines" provide examples.¹⁸⁵ But others, such as the First Amendment rights to freedom of speech and religion, should be and frequently are interpreted as reflecting partly independent interests in being able to develop, affirm, and pursue a personal vision of what is choice-worthy.¹⁸⁶ To be sure, rights to freedom of speech and religion probably tend to promote happiness and preference satisfaction in most contexts. But rights such as these should be viewed as resting on less contingent normative foundations than appeals to social utility.

182. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (footnote omitted)).

183. Compare Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13-39 (1998) (claiming that all or nearly all constitutional rights are rights against rules), with Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1365-66 (2000) (arguing that although many constitutional rights are rights against rules, not all rights fit this framework).

184. See KAPLOW & SHAPELL, *supra* note 3, at 5 n.8 ("Welfare economics . . . is a particular species of consequentialism, for it is based (exclusively) on a particular set of consequences, namely, those that bear on individuals' well-being.").

185. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . .").

186. See Fallon, *Two Senses*, *supra* note 49, at 902-03; cf. NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 114, at 141 ("Rights to freedom of expression are strongly supported by their consequences for political accountability and the growth of knowledge, as well as by considerations of individual autonomy.").

I should emphasize that my view about the appropriate definition of rights, which I believe to be reflected in constitutional law, is ethically pluralist.¹⁸⁷ It does not insist that interests in developing an independent vision of choice-worthiness, or any other value, should always prevail over individual well-being and social welfare. It maintains only that there are values not reducible to well-being that are sometimes more important.

E. *A Note on Moral Methodology*

In upholding ethical pluralism and arguing that some moral and constitutional rights should be recognized for reasons other than the promotion of well-being, I have not only invoked the loosely defined notion of an impersonal point of view, I have repeatedly cited my own judgments about what that hypothesized point of view reveals, and I have appealed to moral convictions that I expect to be widely shared. In *Welfare Versus Fairness*, Kaplow and Shavell rightly call attention to the inherent difficulty in this mode of reasoning. Debunking the appeals to moral intuition made by fairness theorists, they assert that moral intuitions are too much the product of social conditioning to support rigorous, noncircular analysis.¹⁸⁸

The problem is a deep one, but not one that Kaplow and Shavell can escape any more than fairness theorists can. If moral argument cannot begin with appeals to moral intuition or conviction, how else might it begin?¹⁸⁹ In defending their own view, Kaplow and Shavell rely pervasively on such appeals. They appeal to the intuition that human well-being has normative significance.¹⁹⁰ They also draw on a second, related intuition that any principle that reduces everyone's well-being deserves to be rejected.¹⁹¹

Methodologically, Kaplow and Shavell appear to believe that although moral argument may need to start with intuitive or other

187. See generally ANDERSON, *supra* note 86, at 14-15 (sketching a "socially grounded, ideal-based, pluralistic theory of value"); ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 167-72 (1969) (defending value pluralism); SCANLON, *WHAT WE OWE*, *supra* note 122, at 143 (maintaining that "the values that properly guide us remain plural").

188. See KAPLOW & SHAVELL, *supra* note 3, at 71-76 (criticizing philosophers who rely on intuitions as bases for moral analysis).

189. Cf. NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 114, at 7 (asserting that "the use of moral intuition is inevitable, and should not be regretted," in reflective moral reasoning, and that "[t]o trust our intuitions, particularly those that tell us something is wrong . . . we need only believe that our moral understanding extends farther than our capacity to spell out the principles that underlie it").

190. They characterize this as a "value judgment" that is implicit in the welfare economic framework. See KAPLOW & SHAVELL, *supra* note 3, at 25.

191. See *id.* at xviii-xix ("Most individuals — including many of the philosophers we have queried — would not readily endorse a principle of fairness if doing so implies (as it does) that it may be deemed socially good to make everyone worse off.").

precritical judgments, it should not stop there.¹⁹² Further, critical, systematizing reflection must occur, to test which precritical judgments survive and which do not.¹⁹³ I agree with this general approach. I partly disagree about its application.

According to Kaplow and Shavell, most intuitive moral judgments reflect “social norms” or norms of behavior into which children are commonly socialized.¹⁹⁴ Social norms have evolved, they say, to promote two goals: “to reduce opportunistic behavior toward others and to help us best advance our interests.”¹⁹⁵ These two goals can be subsumed, they write, under the more fundamental conclusion that the “raison d’être for social norms” and moral intuitions, which should therefore be the touchstone of systematic moral thinking, “is to promote individuals’ well-being.”¹⁹⁶

This argument is unpersuasive. To begin with, the two asserted goals of social norms — “to reduce opportunistic behavior toward others and to help us best advance our interests” — can pull in opposite directions. In some cases, behaving opportunistically might be the best way for any particular person to advance her own interests. It is far from obvious how these sometimes divergent desiderata conjoin as elements of a master aim of “promot[ing] individuals’ well-being,” especially insofar as Kaplow and Shavell leave the concept of well-being substantially undefined.

A second objection is more fundamental. Even if most intuitive moral judgments did trace to social norms that were functionally adapted to the promotion of individual and social well-being (as somehow defined), the question would remain: But *should* well-being be the exclusive concern of private moral deliberation and public decisionmaking? Cultural history and evolutionary biology cannot answer this question.¹⁹⁷ An answer can only be sought through moral inquiry, conducted before the tribunal of reason. We need to examine

192. See *id.* at 73-74 & n.108 (distinguishing “the direct use of particular intuitions or instincts about the fairness of particular acts or rules from the systematic study of a wide range of such intuitions for the purposes of critically assessing them and thereby attempting to identify what principle or principles underlie them”).

193. See *id.* at 72 n.108 (“Unless we believe our instincts and intuitions to have been implanted through an infallible (perhaps divine) mechanism, we must inquire into their possible origins and functions in order to assess what weight, if any, we should give them as evaluative principles.”).

194. See *id.* at 62 (“We submit that there is often a correspondence — indeed, sometimes an identity — between notions of fairness that are used as independent principles for the evaluation of legal rules and various social norms that guide ordinary individuals in their everyday lives.”).

195. *Id.* at 71.

196. *Id.*

197. See NAGEL, LAST WORD, *supra* note 135, at 105-06 (observing that appeals to convention, cultural practice, or social background cannot resolve ultimate normative questions).

whether we have most reason to try to base all legal rules and moral precepts on calculations of individual well-being, as somehow defined, or whether other considerations also matter.

Kaplow and Shavell have provided their reasons for thinking that all legal judgments should be based exclusively on considerations of individual well-being. I have criticized their arguments and now, in admittedly sketchier terms, have provided reasons for adopting a different framework, capable of supporting rights against welfare, as well as rights that are based on welfare.

CONCLUSION

As Louis Kaplow and Steven Shavell have emphasized, a moral or legal theory that relies on considerations other than well-being risks diminishing the well-being of literally everyone. They believe that theorists who value considerations other than well-being should be deeply disconcerted by this largely tautological observation (that theories that do not set out exclusively to promote well-being may sometimes diminish well-being, imaginably including the well-being of literally everyone, at least in far-fetched cases¹⁹⁸). According to Kaplow and Shavell, reflection on this hazard should lead all legal analysts to embrace a form of welfare economics.

In assessing the argument advanced by Kaplow and Shavell to make well-being the exclusive concern of legal policy analysis, I have argued that it matters enormously how well-being is defined. Under what I have called an ordinal conception, each person's well-being is measured on a scale comprising that person's own ranked preferences among states of affairs. Her well-being is increased or diminished as she moves up or down that ranked list, regardless of the basis for her rankings. In criticizing "fairness" theories, Kaplow and Shavell emphasize such theories' capacity to diminish well-being as measured by the affected people's ordinal scales. Significantly, however, the welfare economic approach endorsed by Kaplow and Shavell cannot employ a purely ordinal conception of well-being. According to Kaplow and Shavell, welfare economics requires interpersonal comparisons of utility; analysts need to assess whether and when increases in the well-being of some are sufficiently large to justify diminutions in the well-being of others. For interpersonal comparisons to be possible, however, well-being must be specified in terms of a uniform substantive metric such as happiness or preference satisfaction.

198. See KAPLOW & SHAPELL, *supra* note 3, at 58 ("[I]t is virtually a tautology to assert that fairness-based evaluation entails some sort of reduction in individuals' well-being, for notions of fairness are principles of evaluation that give weight to factors unrelated to individuals' well-being.").

As soon as well-being is given a substantive definition, however, then a person's well-being can no longer be definitionally equated with what she necessarily values most or would choose for herself as reflected by her ordinal preference scale. If, for example, well-being were defined as preference satisfaction or as happiness, then people might value freedom of speech and religion more than marginal increments of well-being. (Better Socrates dissatisfied than a fool satisfied.) Indeed, it becomes imaginable that the well-being maximizing rule (if well-being were thus defined) might sometimes be one that literally no one would choose.

This is a point of fundamental importance in the evaluation of Kaplow and Shavell's argument: their own preferred welfare economic methodology is vulnerable to the same criticism that they think devastates fairness theories. Their version of welfare economics might dictate legal rules that would increase well-being as defined by an analyst's chosen substantive measure, but that no one would choose and that would make everyone worse-off as measured by ordinal preference rankings.

Recognition of the potential gap between substantive conceptions of well-being and what a person might rationally choose reveals the need for careful reflection on the relation of well-being to other values. In contrast with Kaplow and Shavell's argument that well-being is the architectonic value of values, I have maintained that well-being is more perspicuously defined in less imperialistic terms. As I would define it, well-being is an important prudential value, involving a sequence of diverse but desirable experiential states over the course of a complete life, but it is not necessarily the exclusive rational aim. From a personal point of view, we may value ideals more than our own well-being. Nor is well-being all that matters when we assume an impersonal moral perspective. We value diverse goods in diverse ways and recognize morally various obligations and constraints. Choice-worthiness is a concept distinct from well-being.

Just as well-being is not necessarily all that people value, nor what they would always choose for themselves, neither should it function as the exclusive concern in the design of legal rules. Whereas our reasons to value our own well-being are prudential, decisions about the content of legal rules should be moral ones, reflecting impartial judgments of what we owe to each other and what a political community owes to its citizens. From an impartial perspective, individual well-being matters, but other considerations are also pertinent. Crucial among these, I have argued, are individual choice and the background conditions necessary for autonomous judgment. When well-being is distinguished from choice-worthiness, and opportunities for autonomous choice are seen to have a value independent of what is chosen, grounds emerge for the recognition of rights against welfare.