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Public Legal Reason


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PUBLIC LEGAL REASON*

*Lawrence B. Solum***

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INTRODUCTION: NORMATIVE LEGAL THEORY

WHAT normative theory should guide the study of law? This is the central question of contemporary legal theory—a question that crosses disciplines and approaches. The question has many variations. In public-law theory, the emphasis is usually on normative legal theories that draw on political philosophy—libertarianism, egalitarianism, and popular sovereignty come to mind. In private-law theory, the emphasis has usually been on comprehensive moral doctrines and, in particular, on the clashes between fairness and welfare or between deontology and consequentialism.

In this Essay I shall argue that normative legal theory should be shallow rather than deep. That is, I shall argue that normative theorizing about public and private law should eschew reliance on the deep premises of deontology or consequentialism and should instead rely on what I shall call “public values”—values that can be affirmed without relying on the deep and controversial premises of particular comprehensive moral doctrines. The argument that I advance will begin with the idea of “public reason,” the common resources for deliberation and justification that are available to any reasonable¹ citizen in a pluralist and democratic society. My central claim is that the ideal of public reason that is appropriate for a pluralist democracy gives public values, and not deep moral theories, pride of place in the enterprise of normative theorizing about law. This idea is given definition by an *ideal of public legal reason*—a normative theory of the reasons that are appropriate for legal practice and for legal theory that aims to guide that practice.

¹The term “reasonable” is used here in a Rawlsian sense. See John Rawls, *Political Liberalism* 48–54 (expanded ed. 2005). Rawls distinguishes between the “reasonable” and the “rational.” Following Rawls, I will not attempt a definition. Persons are reasonable insofar as they recognize the idea of reciprocity and are willing “to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so.” *Id.* at 49. Someone can be rational in the pursuit of her own ends without being reasonable; a rational person could reject the idea of reciprocity. *Id.* at 50.

To give this abstract argument shape and context, I shall use a more particular question to illustrate and test my arguments: what normative legal theory is appropriate for theorizing about private law under the conditions that prevail in contemporary pluralist democracies? Although the examples that I use will be drawn mostly from legal discourse in the Anglophone common-law world, my claims are not limited to the United States and similar legal cultures—they extend, in theory, to any contemporary pluralist democracy. In analyzing this particular question, I shall use the contemporary debate between fairness and welfare (or consequentialism and deontology) as my foil. That debate has recently been driven by an influential and controversial series of articles by Louis Kaplow and Steven Shavell,² cumulating in their book *Fairness versus Welfare*.³ Kaplow and Shavell have argued that normative legal theory in general, and theorizing about private law in particular, should be guided by *welfarism*—a normative theory associated with the discipline of economics. In addition, they claim that considerations of fairness should be entirely excluded from normative legal theory. In other words, Kaplow and Shavell argue for a particular form of consequentialism as the exclusive method for the normative evaluation of private law. In opposition to their claim, I shall argue that welfarism (as a comprehensive and exclu-

² See, e.g., Louis Kaplow & Steven Shavell, Any Non-welfarist Method of Policy Assessment Violates the Pareto Principle, 112 J. Pol. Econ. 281 (2001) [hereinafter Kaplow & Shavell, Any Non-welfarist Method]; Louis Kaplow & Steven Shavell, Any Non-welfarist Method of Policy Assessment Violates the Pareto Principle: Reply, 109 J. Pol. Econ. 249 (2004); 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, Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice, 32 J. Legal Stud. 331 (2003); Louis Kaplow & Steven Shavell, Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency, 110 Yale L.J. 237 (2000) [hereinafter Kaplow & Shavell, Notions of Fairness]; Louis Kaplow & Steven Shavell, Reply to Ripstein: Notes on Welfarist versus Deontological Principles, 20 Econ. & Phil. 209 (2004); Louis Kaplow & Steven Shavell, All Individuals May Be Made Worse Off Under Any Nonwelfarist Principle (John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 350, 2002), available at <http://ssrn.com/abstract=304385>; Louis Kaplow & Steven Shavell, Principles of Fairness versus Human Welfare: On the Evaluation of Legal Policy (John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 277, 2000), available at <http://ssrn.com/abstract=224946>.

³ Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (2002); see also Louis Kaplow & Steven Shavell, Fairness versus Welfare, 114 Harv. L. Rev. 961 (2001) [hereinafter Kaplow & Shavell, *Fairness versus Welfare* (article)].

sionary moral doctrine) has no legitimate place in normative legal theory because it is inconsistent with the requirements of public reason and hence with the legitimacy of private law. The argument that I make will also imply that an exclusive emphasis on the deep premises of deontological moral theory is also inappropriate. Reduced to a slogan, my claim could be put as follows: *both fairness and consequences, but neither welfarism nor deontology.*

My discussion of welfarism in general, and Kaplow and Shavell in particular, will focus both on the general relationship between welfarism and public reason and on the particular claims that Kaplow and Shavell make on behalf of welfarism. One of these claims—that any nonwelfarist methodology can result in the counterintuitive conclusion that a possible world that makes everyone worse off is better than one that makes everyone better off—provides the occasion for an extended discussion of the conceptual heart of welfarism as the exclusive method for the evaluation of legal policies.

In the remainder of this Introduction, I introduce the conceptual vocabulary that grounds the rest of the Essay and, in particular, five concepts: welfarism, consequentialism, fairness, deontology, and public reason. The aim is to give a preliminary definition of these ideas that will both clarify and adumbrate the more detailed arguments that follow.

Welfarism is the view that policies (or, strictly speaking, the states of affairs that policies produce) should be assessed solely by a social-welfare function that considers only information about individual preferences. Welfarism can be combined with another idea, *consequentialism*, the view that actions should be evaluated solely on the basis of their consequences (the states of affairs which the actions produce). Kaplow and Shavell's thesis is that assessment or evaluation of legal policies should be based solely and exclusively on the consequences of legal policies for the satisfaction of preferences from an impartial or anonymous point of view. For them, fairness and other rival moral values simply have *no* role to play in the normative evaluation of the law.

Fairness is the idea that policies (and not, strictly speaking, the states of affairs that policies produce) can be assessed in part by the criteria of corrective and distributive justice. In contrast to welfarism, fairness is inconsistent with consequentialism because the

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justice or injustice of a policy is not solely a function of the consequences that the policy produces. The idea of fairness may be grounded in *deontology*—an approach (or family of approaches) to moral philosophy. Deontological theories maintain that the rightness or wrongness of actions is not reducible to the value of the states of affairs that they produce. Rather, an action may be wrongful because it violates rights, even if the action produces good consequences.

Public reason, for the purposes of this Essay, is the common or shared reason of citizens in a pluralist and democratic society. An *ideal of public reason* provides a normative standard for assessment of the kinds of reasons offered in public, political, and legal contexts. Here, I shall be dealing with a subset of public reason (legal reason) and a subset of the ideal of public reason (an ideal of legal reason), a normative standard for the practice of justification by lawyers, judges, and other officials.

The significance of the fairness-versus-welfare debate for the practice of normative legal theory can hardly be overstated. For example, Kaplow and Shavell claim that there is only one reasonable approach to normative legal scholarship, and that approach is welfarism. The obvious implication is that other normative theories should be set aside. Legal scholars working in the traditions of corrective justice, critical legal studies, critical race theory, feminist jurisprudence, neoformalism, liberal political theory, libertarianism, and virtue jurisprudence are in serious need of reeducation. Even utilitarians who do not identify utility with preferences are seriously misguided. If Kaplow and Shavell's arguments are correct, then most of the legal academy should confess error, repudiate their prior normative work, and prepare for a brave new world.

But Kaplow and Shavell are not unique in their totalitarian ambitions. There are other legal theories that make similar claims. Ronald Dworkin, for example, has argued that consequentialism (or policy, as he puts it) has no place in judicial reasoning.⁴ Of course, every legal theory worth its salt claims to be true or correct

⁴ Ronald Dworkin, *Hard Cases*, in *Taking Rights Seriously* 81, 84 (1977); Ronald Dworkin, *Hard Cases*, 88 *Harv. L. Rev.* 1057, 1060 (1975).

in some sense,⁵ but many theories admit of a reasonable pluralism of theoretical perspectives.⁶ That is, many normative theories of law acknowledge that at least some competing theories could be affirmed by reasonable persons; for some normative theories, the fact of reasonable pluralism is one of the features of the world that has important normative consequences.⁷ Many theorists view their own theory as the best member of the set of reasonable theories and believe that diverse theoretical perspectives can share common principles. However, because Kaplow and Shavell's argument claims that their opponents are committed to contradictory beliefs, it implies that competing theories are not only wrong but also unreasonable, irrational, or inconsistent.

This Essay proceeds as follows. Part I will situate the fairness-versus-welfare debate by placing welfare economics in the context of moral and political philosophy and contemporary legal theory. Part II will articulate and argue for an ideal of public legal reason. Part III will put welfarism at the bar of public legal reason and find it wanting. The Essay will conclude that arguments of policy and principle both have roles to play in public legal reason.

Since the argument of this Essay is long and complex, a few additional words of introduction may be of assistance to the reader. This Essay will advance two central theses. The first thesis, the focus of Part II, is that a particular ideal of "public legal reason" is supported by considerations of political morality and legal theory. The second thesis, the focus of Part III, is that the version of welfarism advocated by Kaplow and Shavell does not meet the requirements of public legal reason. In the course of advancing the second thesis, this Essay will take an in-depth look at Kaplow and Shavell's claim that any nonwelfarist theory of policy evaluation violates the requirements of weak Pareto. Given the two theses, this Essay will then reach its final conclusions. The practice of legal justifica-

⁵ This claim may be exaggerated. Some postmodern views of the world may not claim to be true or correct. Such theories may be illuminating, revealing, or edifying. See Richard Rorty, *Philosophy and the Mirror of Nature* 11–12 (2d prtg. 1980).

⁶ The idea of reasonable pluralism is closely related to John Rawls's views. See Rawls, *supra* note 1, at 441. A similar perspective is found in Cass Sunstein's notion of an incompletely theorized agreement. See Cass R. Sunstein, *Legal Reasoning and Political Conflict* 8 (1996).

⁷ For example, in justice as fairness, the fact of reasonable pluralism plays a central role. See Rawls, *supra* note 1, at 489.

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tion should limit itself to values that are accessible to reasonable citizens. This means that law's deliberations should be shallow, not deep.

I. SITUATING THE FAIRNESS-VERSUS-WELFARE DEBATE

The fairness-versus-welfare debate will make more sense if placed in context by (1) considering welfarism in the history of economic thought in general and welfare economics in particular, (2) situating welfarism and fairness on the map of moral and political philosophy, and (3) exploring the relationship between fairness and welfare to the topography of normative legal theory.

A. Welfare Economics

The fairness-versus-welfare debate reflects the importance of the law and economics movement in the legal academy. Legal economics, like economics generally, has a descriptive (or positive) and a prescriptive (or normative) branch. Descriptive economics seeks to predict and explain economic behavior, and descriptive legal economics typically seeks to predict and explain economic behavior as it is affected by legal rules. Normative economics is concerned with the evaluation of economic behaviors and government policies, while normative law and economics is concerned with the evaluation of legal rules. In *Fairness versus Welfare*, Kaplow and Shavell practice both descriptive and normative economics, but welfarism is self-avowedly a normative theory.

There are several plausible formulations of normative economics, but almost all of normative economics begins with the fundamental idea of utility as a conception or measure of the good. Economists may disagree about the nature of utility, the relationship of utility to social welfare, and the role of welfare in public policy, but most (if not all) economists would assent to the abstract proposition that, *ceteris paribus*, more utility is a good thing.

Beyond such very general agreements, there are a host of disagreements within economic theory. One key divide is between cardinal and ordinal interpretations of utility. An ordinal utility function for an individual consists of a rank ordering of possible

states of affairs (*possible worlds*) for that individual.⁸ An ordinal function indicates that individual *i* prefers possible world *X* to possible world *Y*, but it does not indicate whether *X* is much better or only a little better than *Y*.⁹ A cardinal utility function yields a real-number value for each possible world. Assuming that utility functions yield values expressed in *utils* (units of utility), then individual *i*'s utility function might score possible world *P* at 80 utils and possible world *Q* at 120 utils. One can represent the utility function *U* of individual *i* for *P* and *Q* as follows:

$$U^i(P) = 80 \text{ utils}$$

$$U^i(Q) = 120 \text{ utils}$$

The distinction between cardinal and ordinal utilities is potentially important for utilitarianism, at least on certain interpretations. As a theory of evaluation, utilitarianism is the view that an action is the best action if and only if the action maximizes utility when compared with all possible alternative actions.¹⁰ For technical reasons, utilitarianism requires both cardinality and full interpersonal comparability.¹¹ This point about utilitarianism is closely related to the history of welfare economics,¹² the explicitly normative branch of economic theory.

Both cardinality and interpersonal comparability pose measurement problems for economists. Even in the case of a single individual, it is difficult to measure cardinal utilities reliably. Measure-

⁸ For the most part, I shall use the philosophical locution "possible world" rather than the economists' phrase "state of affairs" for the remainder of this Essay.

⁹ Economists sometimes talk about the utility of consumption of goods or services as opposed to the utility of states of affairs. Talk about the utility of consumption or of goods is shorthand for talk about states of affairs or possible worlds. When an economist says "Ben would receive a utility of 100 by consuming a widget," that statement can be translated into "Ben's utility index for a possible world in which Ben receives a widget would be 100 points higher than Ben's utility index for a possible world that is identical in all respects except Ben's consumption of the widget."

¹⁰ See John A. Weymark, A reconsideration of the Harsanyi-Sen debate on utilitarianism, in *Interpersonal Comparisons of Well-Being* 255, 299 (Jon Elster & John E. Roemer eds., 1991) ("Utilitarian theories evaluate the relative desirability of social alternatives in terms of a weighted sum of the utilities obtained by each person in society from the alternatives being considered.").

¹¹ *Id.* at 303. The intuitive idea follows from the notion that utilitarianism requires maximization of utility across persons, "the greatest good for the greatest number." Maximization *across persons* requires interpersonal comparability. *Maximization across persons* requires cardinality.

¹² See Robin Boadway & Neil Bruce, *Welfare Economics* 1, 5–6 (1984).

ments that support interpersonal comparisons are even more difficult to justify, and cardinal interpersonal comparisons seem to require a variety of controversial value judgments. Market prices cannot serve as a proxy for utility for a variety of reasons, including wealth effects.¹³ The challenge for welfare economists is to develop a methodology that yields robust evaluations but does not require cardinal interpersonally comparable utilities.

This is the point at which the Pareto principles arrive on the scene. Suppose that all the information available about individual utilities is ordinal and *not* interpersonally comparable. In other words, each individual can rank order possible worlds, but analysts or policymakers cannot compare the rank orderings across persons.¹⁴ The weak Pareto principle suggests that possible world *P* is socially preferable to possible world *Q* if everyone's ordinal ranking of *P* is higher than his ranking of *Q*. Weak Pareto does not go very far because such unanimity of preferences among all persons is rare. The strong Pareto principle suggests that possible world *P* is socially preferable to possible world *Q* if at least one person ranks *P* higher than *Q* and no one ranks *P* lower than *Q*. Unlike weak Pareto, strong Pareto does permit some relatively robust conclusions.

The so-called *new welfare economics* was based on the insight that market transactions without externalities satisfy strong Pareto. If the only difference between world *P* and world *Q* is that in *P*, individuals i_1 and i_2 engage in an exchange (money for widgets, chickens for shoes) where both prefer the result of the exchange, then the exchange is Pareto efficient—and hence satisfies the strong Pareto principle. A possible world where no further Pareto-efficient moves (or trades) are possible is called Pareto optimal. The assumption about externalities is, of course, crucial. If there

¹³ See Elizabeth Hoffman & Matthew L. Spitzer, Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications, 71 Wash. U. L.Q. 59, 85–87 (1993).

¹⁴ See Kenneth J. Arrow, Social Choice and Individual Values 9 (2d ed. 1963). For legal applications, see, for example, David Luban, Social Choice Theory as Jurisprudence, 69 S. Cal. L. Rev. 521 (1996); Arthur Lupia & Mathew D. McCubbins, Lost in Translation: Social Choice Theory Is Misapplied Against Legislative Intent, 14 J. Contemp. Legal Issues 585 (2005); William T. Mayton, The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies, 1986 Duke L.J. 948.

are negative externalities of any sort, then the trade is not Pareto efficient.¹⁵

Strong Pareto plus ordinal utility information allows some possible worlds to be ranked on the basis of everyone's preferences. A method for transforming individual utility information into such a social ranking is called a social-utility function. Kenneth Arrow's impossibility theorem demonstrates that it is impossible to construct a social-utility function that can transform individual *ordinal* rankings into a social ranking in cases not covered by strong Pareto if certain plausible assumptions are made.¹⁶ Arrow's theorem has spurred two lines of development in welfare economics. One line of development relaxes various assumptions that Arrow made, for example, Arrow's assumption that the social ranking must be transitive (if X is preferred to Y , and Y is preferred to Z , then X must be preferred to Z). The other line of development considers the possibility of allowing information other than individual, noncomparable ordinal utilities.

Suppose that full interpersonal comparability and cardinal utility information are allowed. This is sufficient to support what are called Bergson-Samuelson utility functions,¹⁷ which have the form

$$W(x) = F(U^1(x), U^2(x), \dots, U^N(x))$$

where $W(x)$ represents a real number social utility value for some possible world X ; F is some increasing function that yields a real number; $U^I(x)$ is a cardinal, interpersonally comparable utility value yielded by some procedure for individual I for possible world X ; and N is the total number of individuals.¹⁸

¹⁵ This problem can be ameliorated, however, by considering the possibility of a side payment that would compensate the party injured by the externality. Transaction costs may prevent such side payments; the costs of compensating the injured party may consume more than the surplus value created by transaction. Kaldor-Hicks efficiency addresses this problem by making an additional assumption about what is socially preferable. One could postulate that state X is socially preferable to state Y if zero-transaction-cost side payments were made from those who prefer X to Y to those who prefer Y to X , which would make the recipients indifferent between the states.

¹⁶ See Arrow, *supra* note 14; see also Daniel M. Hausman & Michael S. McPherson, *Economic Analysis and Moral Philosophy* 167–69 (1996).

¹⁷ Boadway & Bruce, *supra* note 12, at 17.

¹⁸ *Id.* at 139.

There are a variety of different possible functions that can be substituted for F . For example, one could substitute summation (Σ) for F and simply add the individual utility values. This is sometimes called a Benthamite or classical utilitarian social-welfare function and is famously associated with Jeremy Bentham. The classical utilitarian social-welfare function can be represented as follows:

$$W = \sum_{h=1}^H u^h$$

In the alternative, one could substitute the product function (Π) and multiply individual utilities. This is sometimes called a Bernoulli-Nash social-welfare function, which can be represented as follows:

$$W = \prod_{h=1}^H u^h$$

The Bernoulli-Nash social-welfare function has an important technical advantage over the classical utilitarian function because the former requires only information about the relative strength of individual preferences, whereas the latter requires information on some absolute scale. Bernoulli-Nash differs from the classical utility function in another important respect—it strongly favors equality (minimization of deviation) among individual utility values. There are a variety of other possible social-welfare functions, some of which will be discussed in greater detail below.

Welfarism is an important component of Kaplow and Shavell's theory. Welfarism is lucidly defined by Professor Amartya Sen, who states:

“[W]elfarism[.]” . . . insists that states of affairs must be judged exclusively by the utility information (such as happiness or desire fulfillment) related to the respective states—no matter what the other features of the consequent state of affairs may be, such as the performance of particular acts (however nasty), or the violation of other people's liberties (however personal).¹⁹

¹⁹ Amartya Sen, *Consequential Evaluation and Practical Reason*, 97 *J. Phil.* 477, 478–79 (2000); see also Boadway & Bruce, *supra* note 12, at 8.

Sen's definition gives us a good sense of the general concept of welfare, but welfarism as advocated by Kaplow and Shavell represents a very particular approach to welfare economics. Their version of welfarism departs from the main line of development of the new welfare economics because they assume that cardinal and interpersonally comparable utility information is available. That is, Kaplow and Shavell's version of welfarism is committed to a Bergson-Samuelson social-welfare function. On the other hand, welfarism is *not* equivalent to a particular form of that function. In particular, welfarism is not committed to classical utilitarianism, although most welfarists (including Kaplow and Shavell) espouse the idea that a social-welfare function must be an increasing function of individual utilities.

B. Moral and Political Philosophy

This Section takes a step back and approaches the fairness-versus-welfare debate from another angle—by situating the debate within the discourse of moral and political philosophy. Normative economics is related to moral and political philosophy in a variety of ways. An economist might take the position that individual persons should act so as to maximize their expected utilities. Normative rational-choice theory would seem to be a moral or ethical theory, one that philosophers might see as a species of ethical egoism. A welfare economist might advocate a classical utilitarian social-welfare function. To the moral and political philosopher, this would appear to be a form of classical utilitarianism. Thus, viewed from one angle, normative economics simply is applied moral and political philosophy, and theories of welfare are moral and political theories.

There is, however, another way of viewing the relationship between normative economics and moral philosophy. Economists see themselves as social scientists. Given a crude picture of the fact-value distinction, normative economics might be seen as unscientific. Even weak Pareto involves a value judgment, and economists may believe that this value judgment can neither be proved nor disproved. Economists may see such value judgments as subjective rather than objective. This way of looking at normative judgments may stem from a philosophical theory such as noncognitivist metaethics, the view that moral propositions are neither true nor

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false. Crudely put, noncognitivists might believe that moral judgments are simply expressions of approval and disapproval. The reductio ad absurdum of noncognitivism is the famous boo-hooray theory, which reduces the meaning of “*X* is good” to “hooray *X*” and “*X* is bad” to “boo *X*.”²⁰ Although noncognitivism is itself highly controversial in moral philosophy, it seems less controversial (and perhaps even unquestioned or unexamined) in economics.

Whatever the source of economists’ aversion to value judgments, much of the history of welfare economics can be seen as involving value parsimony, or efforts to get the maximum prescriptive content from the “weakest” (meaning “least controversial”) normative assumptions. Hence, the new welfare economists tried to operate on the basis of one normative assumption, strong Pareto. From their point of view, strong Pareto appears to be uncontroversial. Even if it cannot be proven, some economists may believe that it is so intuitively plausible and widely shared that it is an appropriate point of departure.

Moral and political philosophy does not share the value parsimony of normative economics. In particular, noncognitivism is highly controversial within the philosophical discipline of metaethics. Although there may have been a time when noncognitivist metaethical theories were dominant, that time has now passed. Although it might be controversial to assert that the cognitivist approaches now dominate, it is surely not controversial to assert that many philosophers now believe that moral propositions are objective, bear truth values, and can be proven or disproven (or can be shown to be better or worse). In addition, as noted below, weak Pareto itself is not an uncontroversial normative assumption from the point of view of moral philosophy.

From the standpoint of moral and political philosophy, welfarism is just one of a whole family of consequentialist moral theories. Because of the important historical role that classical utilitarianism has played in moral philosophy, some philosophers and legal theorists may assume that welfarism is merely a version of act-

²⁰ See Alfred J. Ayer, *Language, Truth and Logic* 102–20 (1952); see also Lawrence Solum, *Legal Theory Lexicon* 041: *Metaethics* (June 20, 2004), http://lsolum.typepad.com/legal_theory_lexicon/2004/06/legal_theory_le.html.

utilitarianism,²¹ but this is not actually the case for multiple reasons. First, welfarism is only a theory about the evaluation of possible worlds; it is not directly a theory about the evaluation of actions. Act-utilitarianism is, however, a theory about the rightness and wrongness of actions. Second, welfarism is only committed to the idea that social welfare is an increasing function of individual utilities, whereas act-utilitarianism is usually thought to be committed to either summation or average (mean) as the relevant function. I could go on, but the point is clear—welfarism should not be conflated with act-utilitarianism.

Another important philosophical question concerns the nature of utility. Welfarism is committed to a view that is close to what moral philosophers might call the preference-satisfaction conception of utility, but there are other conceptions as well. Bentham had a hedonistic conception of utility—utility consists of pleasures and the absence of pain. One might also have a eudaimonistic conception of utility; that is, utility might consist of happiness, understood as a quality that is not reducible to any subjective state, such as pleasure, but is instead an objective condition of human life, such as flourishing.

Contemporary moral philosophy is not limited to consequentialism. What I am about to say is controversial, but I think it is accurate. Within contemporary moral philosophy, utilitarianism is generally thought to have severe problems. To my knowledge, welfarism in the form that has entered contemporary debates about normative legal theory has no champion in moral philosophy, although it is surely possible that someone does hold a position that is close to welfarism. There are consequentialists in contemporary moral philosophy and there are utilitarians of various forms, but these theories are controversial and contested.

What are the alternatives to consequentialism in contemporary moral philosophy? Answering that question in a single paragraph with a simple system of classification is bound to be misleading, but

²¹ Act-utilitarianism is the theory that holds that an action is right if and only if the action produces the best consequences (the most utility) as compared to any other alternative action that could be performed. See David Braybrooke, *Utilitarianism: Restoration; Repairs; Renovations* 11 (2004); see also Lawrence Solum, *Legal Theory Lexicon 008: Utilitarianism* (Nov. 2, 2003), http://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le_4.html.

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there is no other way to proceed. One way of dividing the pie is to classify moral theories as being (1) consequentialist, (2) deontological, or (3) aretaic. Deontological moral theories, as noted above, hold that the rightness or wrongness of actions is not exclusively a function of the consequences they produce but also results from their fairness or unfairness. Some deontological theories exclude consequentialist reasons altogether; on some interpretations, Kant's theory does this. Other deontological moral theories allow for the consideration of consequences in some circumstances but maintain that considerations of fairness trump good consequences in other circumstances.

In addition to consequentialist and deontological views, some moral theories are aretaic. The word "aretaic" comes from the Greek word "arete," which can be translated as virtue or excellence. Aristotle's moral views are sometimes classified as aretaic, as are the contemporary theories that are called "virtue ethics." Virtue-centered theories typically deny that there is a master algorithm or decision procedure for ethics. Instead, they focus on character—on what it means to be an excellent or virtuous person. Typically, an aretaic moral theory will include an account of the human excellences or virtues.²²

So far, I have been dealing with moral philosophy, but the relevant landscape includes political philosophy as well. I begin by discussing the relationship between moral and political philosophy. One approach to that relationship would emphasize dependence and reduction. That is, one might think that political philosophy must be grounded on and ultimately reducible to moral philosophy. On this view of the relationship, political theories are ultimately consequentialist, deontological, or aretaic. This does not mean that political philosophies would not have distinctive content. After all, there are many different approaches to the organization of society that could be given consequentialist foundations. One can imagine consequentialist foundations for either deliberative democracy or for a minimalist night-watchman state. The other approach to the relationship between political and moral philoso-

²² See generally Rosalind Hursthouse, *On Virtue Ethics* 25–42 (1999); Rosalind Hursthouse, *Virtue Ethics*, in *Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2003), <http://plato.stanford.edu/entries/ethics-virtue/>.

phy would emphasize the independence of political philosophy from moral theory. This idea is thematized in the later work of John Rawls, especially *Political Liberalism*²³ and associated essays. There are a variety of positions in contemporary normative political theory, including Rawls's theory, justice as fairness, libertarian theories, egalitarian theories, democratic theories, and civic republican theories.

C. The State of the Normative Legal Theory

Legal theory is hardly a monolith, but most of it either describes the law, evaluates the law, or does both. Normative legal theory, in turn, comes in a variety of flavors. Legal formalism is strongly associated with doctrinal scholarship, which evaluates particular doctrines or decisions based on a criterion of coherence with the legal topography. For example, a judicial decision might be criticized on the ground that it is inconsistent with prior decisions or the decisions of a court that ranks higher in the hierarchy of authority. In addition to legal formalism, there are a variety of normative theories that look outside the law for normative guidance. Attempting to categorize normative legal theories and then to generalize about them is fraught with peril, but with this caveat in mind, the following categories are useful as a heuristic:

- (1) *Critical theories of law*, including feminist jurisprudence, critical race theory, and critical legal studies, expose the indeterminacies and bias of other approaches but frequently refrain from making explicit normative recommendations;
- (2) *Liberal legal theories*, including law as integrity, legal versions of justice as fairness, and libertarian approaches to law, emphasize considerations of fairness and the importance of rights;
- (3) *Normative law and economics* emphasizes the value of efficiency and may be grounded in utilitarianism or pragmatism;

²³ Rawls, *supra* note 1.

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(4) *Practical-reason* and *virtue-jurisprudence* approaches emphasize the role of practical judgment in legal decisionmaking and may consider the role of law in shaping character;

(5) *Republican*, *deliberative-democracy*, and *discourse* approaches emphasize the value of reaching political decisions through just processes; and

(6) *Pragmatism* or *legal pragmatism* eschews unifying normative theories and emphasizes practical judgments about particular cases.

One can slice and dice the normative legal theory pie in various ways. For example, critical theorists want to emphasize the affinities of liberalism with law and economics. For the purposes of this Essay, the point of these rough-and-ready classifications is simply to situate welfarism in general, and Kaplow and Shavell's version in particular, in the context of the plurality of approaches to normative legal theory.

II. PUBLIC LEGAL REASON

The central claim of this Essay is two-sided. On its face, the central claim is positive and general: normative legal theory should employ the resources of "public legal reason," understood as legal reasons that are accessible by all reasonable citizens. The flip side of that claim is negative and more specific: Kaplow and Shavell are wrong, and welfarism should not be the exclusive normative approach to the evaluation of legal policies. Indeed, Kaplow and Shavell's version of welfarism—to the extent that it claims exclusivity—does not provide judges or legal scholars with an appropriate basis for reasoning.

A. The Idea of Public Reason

"Public reason" is the common reason of a political society; it is the shared capacity of citizens to engage in political deliberation. An ideal of public reason provides a systematic answer to the following question: what limits does political morality impose on public political debate and discussion by the citizens of a modern pluralist democracy? This question has given rise to a substantial

debate, one that primarily has played out among political philosophers, legal theorists,²⁴ and theologians. For example, some have argued that reliance on religious reasons should be restricted in public debate and deliberation about public policy.²⁵ Still others contend that in public debate, an ideal of political morality should mirror the freedom of expression: all viewpoints should contend in a marketplace of ideas. Because legal institutions such as courts and legislatures make use of public reason, it is not surprising that the idea of public reason has stirred much interest among philosophers of law and legal theorists.

Contemporary debates about public reason have tended to focus on the content of the principle (or set of principles) that should serve as an ideal of public reason. This disagreement occurs because one can conceive of different principles by which an ideal can express the requirement that reason be public. Laying out these principles provides a structure for analyzing the public-reason debate. The structure of the debate can be illuminated by considering three alternative principles that can be used to give content to an ideal of public reason: (1) a principle of *laissez-faire*, (2) a principle of exclusion, and (3) a principle of inclusion.

Each of the three principles needs brief explication. First, a principle of *laissez-faire* interprets the idea of public reason as reason that is free of constraint, with the corollary that all reasons are public reasons. Second, a principle of exclusion rules out the use of at least some sorts of nonpublic reasons in at least some situations. For example, an ideal of public reason that excluded all nonpublic reasons from all political discourse would employ a simple principle of exclusion. Third, a principle of inclusion requires the use of at least some sorts of public reasons in at least some situations. For example, an ideal of public reason that required participants in

²⁴ See, e.g., Kent Greenawalt, *Private Consciences and Public Reasons* 39–50 (1995).

²⁵ See, e.g., Robert Audi, *Religious Commitment and Secular Reason* 169–80 (2000). For other recent discussion of this question, see Rick Garnett, *More on Justice Thomas, Public Reason, and Natural Law* (Dec. 16, 2004), http://www.mirrorofjustice.com/mirrorofjustice/2004/12/more_on_justice.html; Lawrence B. Solum, *Natural Law, Public Reason, and the Constitution* (Dec. 15, 2004), http://lsolum.blogspot.com/archives/2004_12_01_lsolum_archive.html#110312865410052268; Lawrence B. Solum, *Steve Smith Has Questions About Justice Thomas & Natural Law with an Updated Post Script* (Dec. 16, 2004), http://lsolum.blogspot.com/archives/2004_12_01_lsolum_archive.html#110321991307216361.

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public political debates to offer a sincerely held public reason for each position advanced would deploy a principle of inclusion.

The three basic principles can be combined in various ways to produce a complex ideal of public reason. A principle of exclusion might apply to public officials, but a principle of laissez-faire might apply to ordinary citizens. Different principles might apply to public debate over the constitutional essentials than to ordinary legislation, adjudication, or executive action. One set of principles might apply to public justifications and a different set to private deliberations.

Sometimes it seems that the public-reason debate is a contest between a simple principle of laissez-faire, advocated by those whose aim is to formulate an ideal of public reason that makes room for deep moral or religious justifications for public policy, and a simple principle of exclusion, advocated by those who wish to keep religion or morality out of politics. As explained below, this view of the debate is far too simple. Positions that at first blush appear to be simple principles of laissez-faire turn out to be complex principles with elements of both laissez-faire and exclusion. Positions that have been interpreted as rigorous principles of exclusion turn out to be more accurately characterized as principles of inclusion.

B. Rawlsian Public Reason

Although the idea of public reason can be found²⁶ in Hobbes,²⁷ Rousseau,²⁸ and Kant,²⁹ it was John Rawls who brought this idea into play in contemporary political philosophy. In sum, Rawls's idea of public reason is marked by three features. First, Rawls understands public reason as the common reason of a political society. A society's reason is its "way of formulating its plans, of putting its ends in an order of priority and of making its decisions accordingly."³⁰ Public reason contrasts with the "nonpublic reasons

²⁶ See Lawrence B. Solum, Constructing an Ideal of Public Reason, 30 San Diego L. Rev. 729, 754–62 (1993).

²⁷ Thomas Hobbes, *Leviathan* 306 (Richard Tuck ed., 1991) (1660).

²⁸ Jean-Jacques Rousseau, Discourse on Political Economy, in *Basic Political Writings* 111, 113 (Donald A. Cress ed. & trans., 1987).

²⁹ Immanuel Kant, An Answer to the Question: 'What is Enlightenment?' in *Political Writings* 54, 55 (Hans Reiss ed. & H.B. Nisbet trans., 2d enlarged ed. 1991).

³⁰ Rawls, *supra* note 1, at 212.

of churches and universities and of many other associations in civil society.”³¹ Both public and nonpublic reason share features that are essential to reason itself, such as simple rules of inference and evidence.³² Public reasons, however, are limited to premises and modes of reasoning that are accessible to the public at large. Rawls argues that these include “presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.”³³ By contrast, the nonpublic reason of a church might include premises about the authority of sacred texts and modes of reasoning that appeal to the interpretive authority of particular persons. Nonpublic reasons are not, however, limited to religious reasons. The deep and controversial premises of any comprehensive moral conception, such as utilitarianism or Kantian deontological ethics, are also nonpublic reasons.

Second, Rawls formulates a particular ideal of public reason—a standard for judging the appropriateness of the reasoning of citizens and officials. Rawls’s discussion is limited to “the constitutional essentials”³⁴ and “questions of basic justice.”³⁵ Thus, the scope of the freedom of speech and qualifications for the franchise would be subject to the Rawlsian ideal, but he does not resolve the question whether it would also apply to the details of tax legislation and the regulation of pollution control.³⁶

Third, Rawls’s ideal of public reason applies to citizens and public officials when they engage in political advocacy in a public forum; it also governs the decisions that officials make and the votes that citizens cast in elections. The ideal does not apply to personal

³¹ Id. at 213.

³² Id. at 220.

³³ Id. at 224.

³⁴ The constitutional essentials are simply the basic provisions of the constitution: the structural provisions that determine legislative, executive, and judicial power and the rights-conferring provisions that ensure basic constitutional rights such as the right to vote, liberty of conscience, freedoms of speech and religion, and the right to due process. See id. at 227.

³⁵ Questions of basic justice include the scope of essential liberties, such as freedom of conscience and expression, as well as core commitments to fairness in the distribution of wealth, income, and other primary goods. Id. at 214, 227–30.

³⁶ Rawls notes that a full account of public reason would need to offer an account of these subjects and how they differ from the constitutional essentials and questions of basic justice. See id. at 214–15.

reflection and deliberation about political questions;³⁷ by implication, it could not apply to such reflection or deliberation about questions that are not political in nature.

Rawls's case for an ideal of public reason rests on a factual premise. Rawls argues that given free institutions, one cannot expect agreement on fundamental questions of morality and religion. Moreover, the pluralism that characterizes modern democratic societies is not a transitory phenomenon; since the Wars of Religion, it has been apparent that agreement on a single comprehensive moral or religious conception of the good cannot be reached without unacceptable use of coercive state power. Given this fact, which can be called the fact of pluralism, Rawls argues that one should adhere to what he calls the liberal principle of legitimacy. That principle states: "Our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."³⁸ It is because of this principle that "the ideal of citizenship imposes . . . the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."³⁹ The duty of civility implies that the fundamental content of Rawls's ideal of public reason is a principle of inclusion: civility requires that political justification include public reasons, because public reasons can be accepted by our fellow citizens as reasonable and rational.

C. Is the Exclusion of Deep Premises Justified?

The full debate over the best ideal of public reason for a modern democratic society must include a comparison of various principles of laissez-faire, inclusion, and exclusion in a variety of contexts.⁴⁰ An illustration of that debate is the controversy over the question whether an ideal of public reason should incorporate any principle of exclusion.

³⁷ Id. at 215.

³⁸ Id. at 217.

³⁹ Id.

⁴⁰ See Solum, *supra* note 26, at 741–51.

A relatively easy case is posed by the question of whether citizens should refrain from the giving of religious reasons in public political debate. Although some may disagree, there is a strong case against this exclusion on the grounds that it is unfair to religious believers. Why should religious believers accept as legitimate an ideal of public reason that allows adherents of secular moral views to advance their comprehensive moral doctrines, even when they are not part of the public political culture, but prohibits believers from doing so? Rawls's wide ideal of public reason does not suffer from this sort of unfairness because it treats all comprehensive doctrines, whether religious or secular, equally: utilitarianism, Kantianism, and Catholicism stand on the same footing because each articulates deep and comprehensive views about the nature of the good.

In the context of the fairness-versus-welfare debate, the same charge of unfairness that is made by religious believers might be made by welfarists or deontologists. They might argue that the exclusion of the deep premises of their theories is unfair. The answer that could be given to them is the same as the answer that could be given to believers. An ideal of public reason treats the deep premises of all comprehensive religious or philosophical doctrines equally.

Consider another argument against principles of exclusion, advanced by Jeremy Waldron:

What [Rawls's] conception seems to rule out is the novel or disconcerting move in political argumentation: the premise that no one has ever thought of before, but which, once stated, sounds plausible or interesting. Rawls' conception seems to assume an inherent limit in the human capacity for imagination and creativity in politics, implying as it does that something counts as a legitimate move in public reasoning only to the extent that it latches onto existing premises that everybody already shares.⁴¹

Waldron's claim is too strong. If public reason required universal agreement on premises, then public political debate would be impossible.⁴² Even an ideal of public reason that excluded all nonpub-

⁴¹ Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 *San Diego L. Rev.* 817, 838 (1993).

⁴² See Solum, *supra* note 26, at 743.

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lic reasons would allow for premises that are not already shared. To take an obvious example, this exclusionary principle would allow factual premises that are accessible to common science or ordinary science, even though these are not premises that everybody already shares. Moreover, no violation of this principle of exclusion would occur if a citizen used shared political values and factual arguments supported by common sense or ordinary science to argue for a new principle of political morality. Something similar has occurred over the course of the last century or so with respect to the right to privacy, a principle of political morality that is, at least in some sense, new. Thus, Waldron's argument applies only to a very special category of novel political arguments—those that cannot themselves be supported by considerations of public reason.

The force of Waldron's point is further blunted by the fact that the wide ideal of public reason only excludes nonpublic reasons in those cases in which the proviso—that in due course participants in public political debate support the political measures they propose in terms of the principles and values of a public political conception of justice—is not met. One can imagine that novel political arguments would be introduced in cases in which the proviso was satisfied and that over time these novel arguments would become part of the public political culture. As a result, the novel arguments eventually would become public reasons.

Of course, there may remain a category of cases in which a novel political argument that could not itself be supported by public reasons would violate the public-reason-in-due-course proviso because the novel argument is only relevant in contexts in which the proviso could not be met. Even in these cases, the nonpublic reason could be introduced outside of public political debate, in the background culture. Thus, the novel argument might first be introduced in academic discourse or even in an opinion piece in a newspaper or journal of public circulation, so long as the author did not advance the argument as an already sufficient reason for political action. Again, one can imagine a process by which such novel arguments came to be viewed as public reasons over time.

Yet there may still be a category of cases in which a political question arises, and time does not permit gradual public acceptance of a novel political argument that is not itself supported by public reasons and that cannot be supplemented by a public reason

in due course. Even in this case, there seems to be no reason for the wide ideal of public reason to exclude the novel argument if its proponent believes it will be accepted by her fellow citizens as reasonable. The liberal principle of legitimacy states that the exercise of political power is justifiable only when it is exercised in accordance with constitutional essentials that all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational. Although Rawls may occasionally have stated his ideal of public reason in terms of preexisting agreement among citizens about the premises of political argument, there is nothing in his underlying arguments that requires this restriction.

In sum, the Rawlsian ideal of public reason does not exclude novel arguments simply because they are novel. This is true for three reasons: first, novel reasons are public if they can be supported by public reasons; second, novel reasons may be introduced in the background culture and may become public reasons over time if they become accessible to the public at large; and third, any reason counts as public if it is accessible to reasonable citizens. Of course, some novel reasons would not count as public for the purposes of Rawls's ideal of public reason—any reason that is situated within a comprehensive moral or political doctrine in a way that makes it inaccessible to reasonable persons from outside the doctrine would fall into this category. For example, the reasons provided by a new prophetic religion—to the extent that their authority relied on the special religious status of the prophet—would be novel and would not be public.

D. From Public Reason to Public Legal Reason

Up to this point, I have focused on the role of public reason in public political debate. In that context, the best ideal of public reason is inclusive—it allows citizens to advance deep reasons drawn from their comprehensive moral and religious doctrines so long as public reasons are advanced in due course. At this stage, I want to narrow the focus of the inquiry. What are the implications of the idea of public reason for legal reason? The answer to this question will provide the materials for what I call an *ideal of public legal reason*—the normative principles that should govern public reasoning about the law in a pluralist democracy. Although the discussion

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that follows is broadly consistent with a Rawlsian approach to public reason, the ideal of public legal reason advanced here speaks to a variety of issues never addressed by Rawls himself.

The ideal of public legal reason that I advocate is an exclusive ideal. That is, I argue that legal officials should offer only public reasons for their official actions in official contexts. This ideal of legal reason is narrower than Rawls's ideal of public reason, although I argue that it is compatible with Rawls's view.

1. Public Legal Reason and the Legal Practice

How does the idea of public reason translate into the context of legal practice? What constraints, if any, does the best ideal of public reason impose on lawyers who make legal arguments and judges who provide reasons for their decisions in their formal written opinions? These questions should be distinguished from another set of questions—what constraints does public reason impose on the practice of legal scholarship?

I begin by examining the implications of public legal reason for judicial reasoning.⁴³ This is the appropriate starting point because judging is the place where the tread of legal reason meets the road of practical decisionmaking. Lawyers and legal scholars provide input, but judges decide cases. By focusing on judging, I do not mean to diminish the importance of the role of public reason in legislative and executive deliberation and debate. After discussing judging and lawyers, I return to the legislative context and briefly compare and contrast an ideal of public legal reason to the ideal that applies to legislators and other participants in the legislative process.

What about public legal reason for judges and judging? Rawls argued that the Supreme Court serves as an exemplar of public reason: "The court's role is . . . to give due and continuing effect to public reason by serving as its institutional exemplar. This means, first, that public reason is the sole reason the court exercises."⁴⁴ Although Rawls himself did not fully develop an ideal of public legal reason, it is clear that a Rawlsian ideal of public reason has important implications for fundamental debates in legal theory.

⁴³ See William Powers, Jr., *Judging Judging*, 28 Val. U. L. Rev. 857, 863–65 (1994).

⁴⁴ Rawls, *supra* note 1, at 235 (footnote omitted).

One might pose the question as follows: does the best ideal of public legal reason permit judges to invoke the deep premises of comprehensive moral or religious doctrines in their opinions or deliberations? One can imagine a variety of answers to this question. For example, a principle of *laissez-faire* would offer an unqualified affirmative answer, whereas a strong principle of exclusion would offer an unqualified negative response. The intermediate positions could include rules of inclusion or a mixture of *laissez-faire* and exclusion, depending on the particular context.

Before I proceed any further, I need to pause and consider the possibility that the content of the best ideal of public legal reason is fixed by some form of legal formalism—the normative legal theory that holds that the content of judicial reasoning should be limited to reasons provided by authoritative legal sources, and that legal reason should be narrowly conceived as the derivation of rules from precedent, the interpretation of legal texts, and the application of legal rules to particular facts. Legal formalism can be re-described as an ideal of public legal reason that excludes direct reliance on reasons of morality, religion, or political theory—whether shallow or deep.⁴⁵ For the purposes of this Essay, I want to put this possibility to the side. That is, I want to assume that legal reasons may include direct reliance on values derived from outside the law itself. One way of framing this assumption would use Dworkin's theory as an illustration. Assume with Dworkin that judges should resolve ambiguities, conflicts, and vagueness in the legal rules by constructing theories that fit and justify the authoritative legal materials. Legal formalists might assume that what Dworkin calls the "criterion of fit" can do all the work: in other words, formalists believe that we do not need to resort to moral or political philosophy to resolve hard cases. For the sake of argument, let us assume that the legal formalists are wrong. That is, our assumption will be that judges must resort to what Dworkin calls the criterion of justification. The question then becomes, what kinds of justifications are allowed by the ideal of public legal reason? Dworkin's own theory answers this question by going deep—Dworkin's imaginary judge

⁴⁵ See Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, U. Pa. J. Const. L. (forthcoming Oct. 2006).

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Hercules sees no limit to the conceptual ascent that may be required to resolve a hard case. But I question that assumption. In Dworkinian terms, I ask the question whether Hercules ought to limit himself to public reasons when he devises the theory that best fits and justifies that law.

I can frame the discussion of this question by testing the proposition that the best ideal of public legal reason would allow judges to rely on nonpublic reasons drawn from the deep premises of comprehensive religious and moral doctrines. Imagine a possible world that is adjacent to the actual world, with the following difference: judges accept a principle of *laissez-faire* as the governing principle of public legal reason. That is, judges believe that they are normatively justified in relying on the deep premises of comprehensive moral or religious doctrines when they deliberate and when they write opinions. To make the test vivid, assume further that judges routinely disclose their actual reasoning in full. That is, assume that they do not suppress the deep reasons that ground their opinions because it would be more convenient or practical to write shorter opinions that reflect only the surface or shallow reasons upon which they rely. Moreover, assume that judges would not dissemble or conceal their true beliefs in order to avoid political backlash. Because this possible world is adjacent to our own, the judges of this world reflect the moral and religious pluralism that prevails in the actual world. Some judges are theists; others are nonbelievers. Some judges are consequentialists; others are deontologists.

What would the world of *laissez-faire* public legal reason be like? It would be a world in which judges would not infrequently advert to their deepest beliefs about morality or religion as reasons for their legal decisions. For example, in cases involving the margins of life and personhood—paradigmatically, abortion and euthanasia—judges might rely on deep premises about the moral status of persons. One judge might disclose that she relied on comprehensive religious doctrine, which affords the unborn full status as moral persons on the basis of a religious belief that the unborn are ensouled at the moment of conception. Another judge might answer that argument by contending that all religious reasons are based on the false premise that God exists, and that moral personhood depends on the capacity for reason, which does not exist until long after birth. To take a less charged case, imagine a tort case in

which one judge discloses that his decision is based on welfarism and that he disregarded any claims of fairness on the ground that, in the end, only consequences for future possible worlds are of moral significance. Another judge hearing the same case contends that the consideration of consequences is itself deeply immoral and that the case can only be decided on the basis of ex post reasoning about the rights and obligations of the parties.

Is the possible world governed by a laissez-faire principle of public legal reason attractive? There are at least two reasons to answer that question in the negative. The first reason focuses on the value of stability and the potential for deep disagreement to undermine the rule of law. The second reason focuses on the value of legitimacy and the difficulties of submission to legal authority with laissez-faire legal reasons.

Consider first the problem of stability. The actual world is characterized by the fact of pluralism, which means that there is no realistic possibility that a principle of laissez-faire public legal reason would result in a uniformity of opinion about the deep premises of theology or moral philosophy. Whatever the capacities of the doctrine of stare decisis are for producing consensus, those capacities do not extend to agreement over deep matters. Precedent is simply the wrong sort of reason for belief about the ultimate nature of morality or the existence of God. To the extent that deep premises drive the practice of judging, the deep foundations of the law will be inherently unstable—subject to tectonic shifts with the composition of various tribunals. The precise effects of these architectonic shifts will be difficult to predict in advance. There is no guarantee that they will produce rapid and destabilizing changes in the law, but there is no guarantee that they will not. Moreover, one of the things that people want from the law is a stable foundation. The value of a stable foundation for the law is reflected in the great value placed on the rule of law and the associated values of predictability, stability, and certainty.

Consider second the problem of legitimacy. In the possible world governed by the laissez-faire ideal of public legal reason, it will inevitably be the case that many or most citizens will reject the particular comprehensive religious or moral doctrine that provides the crucial deep premises for some decisions. That is, many or most citizens will not believe that these decisions rest on reasonable

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grounds. Of course, it will inevitably be the case that the law may rest on premises about facts or values that are not universally acceptable. But the problem posed by direct reliance on deep premises of particular moral or political doctrines is much more substantial than this. It is one thing to be asked to cooperate on the basis of reasons that are justified by premises one can regard as reasonable but in error. It is quite another to be asked to cooperate on the basis of reasons that one cannot regard as reasonable.

For example, it is one thing to be asked to accept an authoritative decision based on contestable evidence that dioxin causes cancer. It is quite another to be asked to accept that God's plan requires that women be subservient—or, for that matter, for a believer to be asked to accept a decision based on the premise that God does not exist. It is one thing to be asked to accept an authoritative decision that global warming poses a serious danger. It is quite another to be asked to accept an authoritative decision premised on the moral principle that only consequences count—or, for that matter, for a utilitarian to be asked to accept a decision based on the moral premise that only rights count. Reasonable citizens are under no obligation to regard themselves as legitimately bound by the authority of decisions that rest on deep premises that they cannot accept as reasonable. Given the fact of pluralism, many or most citizens will regard any legal decision that rests on deep and controversial premises of religious or moral doctrines as illegitimate in the sense that it lacks reasonable justification.

Legitimacy is to the authority of law as water is to fish and air is to mammals. When law claims authority, it asks for compliance—that those to whom the law is addressed will accept the law as providing a good reason for action. Authority can be legitimate or illegitimate. Illegitimate authority must provide prudential reasons for action—incentives for obedience or punishment for disobedience. A regime of illegitimate authority can be oppressive, ineffectual, or both. It can be oppressive because the reliable imposition of sanctions without voluntary cooperation requires legal institutions that provide pervasive monitoring and frequent punishment, and it can be ineffectual because rates of coerced compliance are likely to be lower than rates of voluntary cooperation with legitimate authority. Moreover, the evil of illegitimacy is not limited to the realm of the practical. Legitimacy reconciles citizens to the binding force of

law; illegitimacy undermines the basis for reconciliation and hence the moral worth of citizenship.

Judging provides an illustrative context for the implications of an ideal of public legal reason for legal practice, but there are other important contexts, including legal advocacy and legislation. There is one sense in which the ideal of public legal reason that applies to judges would apply to lawyers: if a lawyer makes an argument upon which a judge may not rely, the argument will either be futile or give rise to a wrongful use of nonpublic reason. However, there are circumstances in which lawyers may be obligated to make arguments outside the bounds of public legal reason. One such circumstance is the adequate representation of clients who disagree with the ideal of public legal reason. As a matter of procedural fairness, the lawyer may have an obligation to represent the dissenting view to the court, even without expecting that the court will act on the nonpublic reasons that are presented.⁴⁶ A full discussion of the similarities and differences between public reason for courts and legislatures would take us too far afield, but it may be reasonable to allow legislators greater freedom to include nonpublic reasons, even when they discuss or deliberate about legislation in formal contexts such as the floor of Congress.⁴⁷

⁴⁶ Lawrence B. Solum, *Procedural Justice*, 78 S. Cal. L. Rev. 181, 281 (2004) (“A citizen who could be finally bound may wish to raise points that either cannot, or likely will not, have any effect on the outcome of the proceeding. An important example of this involves what we might call ‘principled dissent from legal norms.’ Even if I have no viable legal argument against a legal norm that binds me, I may have an interest in making (or even attempting to make) arguments that the norm is illegitimate.”).

⁴⁷ A full account of the ideal of public reason appropriate to the legislative process goes beyond the scope of this Essay, but the following observations may be helpful. Legislative reasons are provided in many different contexts. The most formal and public of these include official documents such as the preambles of statutes, committee reports, and the like. In those contexts, reasons are offered on behalf of the public and are addressed, in part, to legal officials who may interpret the legislation. In these official contexts, the standard for legislative public reason may be identical to the standard for adjudicative public reason. At the other end of the spectrum, legislators may provide their reasons for supporting or opposing legislation in informal contexts, including statements to the media or speeches to constituents. In these informal contexts, an inclusive ideal of public reason—like the Rawlsian ideal outlined above—seems appropriate. An intermediate case is posed by statements on the floor of a legislative assembly, which are made on behalf of individual legislators, but are also part of the official legislative history. A reasonable case might be made for either an inclusive or exclusive ideal in this intermediate context.

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2. The Implications of Public Legal Reason for Normative Legal Theory

Normative legal theory takes place in what Rawls calls the background culture, which he defines as “the culture of the social, not of the political. It is the culture of daily life, of its many associations: churches and universities, learned and scientific societies, and clubs and teams, to mention a few.”⁴⁸

The ideal of public legal reason that applies to legal practice should not apply directly to legal scholars when they debate and discuss legal policies or normative legal theories. The phrase “normative legal theory” is ambiguous. By “normative legal theory,” I mean to refer to a subset of legal scholarship (broadly understood) that evaluates the criteria of normative desirability for law or that applies those criteria to particular questions of legal policy. Paradigmatically, normative legal theory is practiced by legal academics, but lawyers and judges frequently engage in this practice when they are “out of court,” metaphorically speaking. The propositional content of normative legal theory and legal practice could be identical. That is, the very same normative reason could be advanced either in a law review article or in a judicial opinion. Of course, the propositional content may differ. High normative legal theory—with explicit references to metaethics as well as to moral and political philosophy—is almost never an explicit part of legal practice. The contrary proposition does not hold: legal scholarship frequently includes doctrinal analysis identical to that which occurs in judicial opinions.

The conclusion that normative legal theory should not be governed by the ideal of public legal reason that applies to legal practice is unsurprising and should not be controversial. Legal theorists should be free to investigate the soundness of the ideal of public legal reason. Moreover, normative legal theory may legitimately consider hypothetical circumstances in which the fact of pluralism does not obtain. In a possible world in which there is universal consensus that welfarism was true, there would be no reason to exclude the deep premises of welfarism from the ideal of public legal reason. Of course, even in this possible world, nonpublic reasons would remain: the partial or personal reasons of judges would still

⁴⁸ Rawls, *supra* note 1, at 14.

be proscribed by the norms that governed judicial deliberation and opinion writing.

But even if the ideal of public legal reason appropriate to the actual world (in which the fact of pluralism does obtain) does not apply *directly* to normative legal theory and normative arguments about legal policy, it does apply *indirectly*. I now turn to the argument for *indirect* restraint of normative legal theory.

3. The Relationship Between Normative Legal Theory and Legal Practice

One of the important questions for normative legal theory bears an extremely close relationship to legal practice. Sometimes normative legal theorists ask how judges should decide a particular question of legal policy in the actual world, given the fact of pluralism. Indeed, this form of legal scholarship is ubiquitous—it dominates the law reviews and treatises. When normative legal theorists take up this particular task, advising judges about what they should do and what reasons they should give for doing it, they necessarily assume those restraints for political morality that constrain those whom they advise. In other words, normative legal theorists should not advise judges to do something that would be improper given the ideal of public legal reason that applies.

To be clear, my claim is not that legal theorists may not discuss the ways in which nonpublic reasons bear on legal issues in the actual world. Legal theorists are free to discuss the implications of religious doctrines (such as Buddhism or Roman Catholicism) or comprehensive moral doctrines (such as utilitarianism or Kantian ethics) for particular issues of legal policy as they arise in the actual world. Such discussion does not offend a duty of political morality until and unless it crosses the line from theoretical discussion in the background culture to advocacy, recommendation, or advice for legal practice. Moreover, it must be acknowledged that the line between advocacy and advice on the one hand and theoretical discussion on the other will sometimes be fuzzy—many morally relevant lines have this property. That lines are fuzzy does not mean they cannot guide practice: intermediate cases can be resolved either by careful deliberation about the particular context or by rules of thumb that group recurring situations for reasons of practical convenience.

Another clarification requires recalling the distinction between positive and normative law and economics and then marking a distinction between two different claims that normative legal economists might make. Nothing in this account of an ideal of public legal reason suggests that legal economists should refrain from scholarship that engages in the positive project of delineating the consequences of various legal policy options for welfare. This enterprise is entirely unobjectionable—even though the definition of welfare employed may be controversial if it were to serve in a normative rather than a positive role. Within the project of normative law and economics, one must distinguish between two different claims that might be made. What one might call the *strong* welfarist claim would be the claim that only welfare should count for the purpose of making legal policy. One can then distinguish what might be called the *weak* welfarist claim—that welfare is one of the factors that should be considered. Nothing in the ideal of public legal reason counsels against the weak welfarist claim. The idea that preferences should be taken into account can easily be accommodated within an ideal of public reason, so long as the reason for their relevance is not given in terms of a deep and controversial premise of moral theory.

There is an objection to my account of the relationship between normative legal theory and legal practice that deserves consideration at this point. Even assuming that the ideal of public legal reason that I have offered here is correct, one might argue that legal theorists ought to convince legal practitioners to engage in dissimulation and deception. That is, one might take the position that the role of legal theory is to advocate the best legal policies on the basis of the best (or true, or correct) reasons. If these reasons fail the test of the ideal of public reason, then there is a further question: as a matter of rhetoric (and not truth), can the best policy be justified on the basis of public reasons? If the policy cannot be given a plausible justification with public legal reasons, then the legal theorist should not advocate or recommend the policy. If, however, plausible public legal reasons are available, then the normative legal theory should advocate adoption of the policy on the basis of one set of reasons, knowing that judges will need to justify the policy based on a different set of reasons. Put baldly, the argument is that judges should lie about the true reasons for their decisions.

From a purely consequentialist perspective, the practice of judicial dissimulation will be justified so long as it produces good consequences. And it might be argued that dissimulation offers “the best of both worlds,” that is, the advantages of reliance on the best comprehensive moral or religious theory combined with perceived legitimacy. There is, of course, the risk that legal practice will not remain opaque. To the extent that the public becomes aware of a practice of judicial dissimulation, this awareness might have a delegitimizing effect. For this reason, normative legal theorists would be well advised not to openly advocate dissimulation. A variety of techniques might be employed for the theorist to give oblique advice. For example, a theorist might argue on two fronts: (1) that a particular legal policy is best on the basis of deep reasons; and (2) that the same policy is justified by the best interpretation of the authoritative legal materials. That is, the theorist could offer judges a formalist rationale for a result to be reached on the basis of purely normative internal deliberation. Without naming names, it might even be argued that some legal theorists do precisely this.

In other words, it could be argued that legal theorists should themselves dissimulate by advocating or advising in ways that are intentionally misleading or deceptive. Nothing that can be said in this Essay is likely to change any minds about the wisdom or morality of lying. I can state my own position—that such lying would violate duties of political morality and compromise personal integrity—but those who are not averse to dissimulation are unlikely to place much credence in personal testimony. Some may even discount such testimony as mere “cheap talk.”⁴⁹

E. Public Legal Reason, Welfarism, and Private Law

The context of private law has exemplary significance. Normative law and economics has been particularly influential in private-law fields.⁵⁰ Although normative law and economics undoubtedly has important contributions to make to public law, some public-law

⁴⁹ On “cheap talk” in a different context, see Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 *Wm. & Mary L. Rev.* 1229, 1263–81 (2004).

⁵⁰ See Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 *Md. L. Rev.* 220, 227 (2005) (observing that most law and economics addresses private law).

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topics—including issues involving so-called “human” or “fundamental” rights—have received relatively little attention from legal economists. Unlike private-law fields where law-and-economics scholarship is certainly very important and arguably dominant, it cannot be said that normative law and economics dominates public-law theory. For this reason, it is important to note that the ideal of public legal reason applies fully to private legal practice. That is, legal practitioners should not rely on the deep and controversial premises of comprehensive religious or moral theories when they decide private-law cases.

What are the implications of an ideal of public legal reason for the debate between welfarism and fairness in the context of private law? The implications of the discussion so far can be summarized in the form of brief conclusions:

- (1) The ideal of public legal reason applies to legal practice within the domain of private law.
- (2) The ideal of public legal reason does not require that welfarism be abandoned as a paradigm for normative legal theory as practiced in the legal academy (or elsewhere in the background culture).
- (3) The ideal of public legal reason does not proscribe weak welfarist claims in the context of advocacy or advice to legal practitioners.
- (4) The ideal of public legal reason does proscribe the strong welfarist claim that welfarism is the only appropriate method for the resolution of questions of legal policy within the domain of private law.
- (5) The ideal of public legal reason does allow the consideration of reasons of fairness for the resolution of questions of legal policy within the domain of private law, provided that the reasons are drawn from or supported by public values.

F. Reflexive or Question Begging?

Before leaving this central Part of the Essay, I consider a final objection. One might maintain that the argument made here is question begging—that is, it assumes the conclusion that strong welfarist claims are inappropriate for legal practices—when it lays out the normative foundations of the ideal of public legal reason. Certainly, one can imagine an account of public legal reason that would be susceptible to this objection—all that would be required would be the deployment of some deep anticonsequentialist premise in the argument for the ideal. But such an objection is wholly inapplicable to the argument offered here, which refrains from deep premises and relies only on public values.

This fact about the argument—that the justification for the ideal of public legal reason relies on public reasons—points to an important feature of the case made here. It is reflexive—relying only on premises that are acceptable to the theory of reasons offered by the ideal. This reflexivity is not circularity, although, as is always the case, circularity and reflexivity superficially share a certain structure. Reflexivity is a necessary property of good normative theories of reasons. This point is easily demonstrated. If a theory of public reason relied on nonpublic reasons for its justification, the theory would be internally inconsistent.

The reflexivity of the justifications offered for a theory of public reasons does not, however, mean that nonpublic reasons do not have an important role to play in the discussion of such theories. In the background culture—for example, in the legal academy—it is perfectly appropriate to inquire whether the case for an ideal of public reason can be made within the confines of particular comprehensive doctrines—whether they be religious or philosophical. This task naturally takes a particular form within the scholarly enterprise of normative legal theory: legal theorists can inquire whether the ideal of public legal reason is compatible with various theories—deontological, consequentialist, and aretaic. To the extent that such a theory can be the focus of an overlapping consensus⁵¹ between such theories, both its foundations and potential for stability are improved. To the extent that any particular compre-

⁵¹ See Rawls, *supra* note 1, at 133–72 (discussing the idea of an overlapping consensus).

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hensive doctrine cannot participate in such an overlapping consensus, two worries arise. For those who are tempted by the comprehensive doctrine but are also committed to the public values that underwrite the ideal of public legal reason, their worry concerns the coherence of their own views—inconsistency implies that something must go. For those who are committed to the comprehensive doctrine but who do not share the public values, their worry concerns the possibility of reconciling themselves to the political culture in which they live. Of course, reconciliation is not required for a satisfying life; a life of resistance or withdrawal can be a life of integrity.

III. WELFARISM AT THE BAR OF PUBLIC LEGAL REASON

So far, the discussion of public legal reason has been abstract and general. Let's make the discussion a bit more concrete and particular by applying it to a specific controversy in normative legal theory—the fairness-versus-welfare debate as exemplified by the claims made by Louis Kaplow and Steven Shavell.

A. Kaplow and Shavell's Argument for Welfarism

Kaplow and Shavell have attempted to demonstrate that any conceivable theory or method of policy evaluation that departs from welfarism violates weak Pareto for some pair of possible worlds. They believe that this argument is important because of the great intuitive plausibility of weak Pareto, which merely states that if we compare two possible worlds with counterpart individuals and every individual is better off in one of these worlds, then that world is better. Putting it another way, given a choice between two courses of action, only one of which will improve the welfare of each and every individual, then that course of action is the right one.

Here is an example that illustrates the core idea of Kaplow and Shavell's argument. Suppose policies are evaluated on the basis of fairness and not exclusively on the basis of welfare. For example, as a matter of fairness, criminals should always be punished if they deserve it, even when everyone would prefer that they not be punished. How might this happen? Of course, it is usually the case that criminals will prefer not to be punished, and it is frequently the

case that their friends and family would prefer they not be punished. It is easy to imagine a plausible case in which even the victim would prefer mercy, and the police, prosecutors, judge, and jury all wished they were not required to impose a punishment. Now imagine the (less plausible, but theoretically possible) case in which everyone prefers that the criminal not be punished. (Perhaps the case is so celebrated that everyone in the world has formed an opinion about it.) If society followed a principle that always required the deserved punishment to be imposed, then everyone would be made worse off—assuming that being better or worse off is a function of individual preferences. Therefore, taking fairness into account in punishment could result in making everyone worse off.⁵² If the same person who affirms the weak Pareto principle as a true normative premise also believes that fairness should be considered in evaluating legal policies, that individual is seemingly committed to contradictory beliefs.

In their book *Fairness versus Welfare*, Kaplow and Shavell make several arguments in favor of welfarism. In large part, Kaplow and Shavell's argumentative strategy is simply to remind legal analysts that fairness is in tension with welfare. In other words, Kaplow and Shavell remind their readers that fairness may require a sacrifice in the total sum of welfare (or good consequences). This strategy will appeal to readers with strong consequentialist intuitions, and it may convince readers who have failed to appreciate the many ways in which prioritizing fairness may require the acceptance of bad consequences. But this argumentative strategy is unlikely to persuade legal analysts who accept the proposition that fairness is in tension with welfare, but who nonetheless believe that fairness should trump welfare, at least in certain conditions. To these readers, Kaplow and Shavell's argument seems question begging.⁵³ The

⁵² Although this brief example illustrates Kaplow and Shavell's idea, it is not a rigorous presentation of their position. Many readers may see obvious objections to this simplified version of their argument. In fairness to Kaplow and Shavell, their claims should not be evaluated on the basis of my simplified version of their argument.

⁵³ In fact, Kaplow and Shavell's argument need not be interpreted as question begging. Rather, the charitable interpretation of their argument is that it employs the method of reflective equilibrium. By eliciting considered judgments about particular contexts in which fairness would lead to bad consequences, Kaplow and Shavell try to undermine the more abstract judgment that fairness should sometimes (or always) trump consequentialist considerations. In other words, Kaplow and Shavell are not

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argument made in the previous Part of this Essay suggests that Kaplow and Shavell's arguments are not good reasons within legal practice to the extent that Kaplow and Shavell rely, either explicitly or implicitly, on deep consequentialist premises.

Kaplow and Shavell's argument that fairness can violate weak Pareto is of particular interest because it may provide them with a public reason for affirming welfarism as the exclusive method for the evaluation of legal policies. Kaplow and Shavell claim that it is unreasonable (and perhaps even irrational) to prefer a possible world that makes everyone worse off. Whether or not they say so directly, their arguments seem to imply that their proof gives those who adhere to an ideal of public legal reason a good and sufficient reason to affirm welfarism. In other words, we can redescribe their claim as the claim that they have convincing public reasons to affirm welfarism, and that these public reasons should convince rational or reasonable adherents of nonconsequentialist comprehensive moral doctrines.

B. Kaplow and Shavell's Version of Welfarism

Kaplow and Shavell's core idea is that we should evaluate legal policies solely on the basis of their impact on human well-being or "welfare." This core idea implies that legal analysts⁵⁴ should examine the consequences of those policies, but only if they affect welfare. This view is what Kaplow and Shavell call "welfarism."

To understand Kaplow and Shavell's claim, it is important to note that it is a view about the evaluation of possible worlds; it is not presented as an action-guiding theory. At first this distinction may seem trivial because one might assume that Kaplow and Shavell believe that one ought to act so as to achieve the best possible world. This is not the case, however, and this seemingly peculiar

trying to argue that welfare should trump fairness because the alternative would be fairness at the price of welfare; instead, they are arguing that reasonable persons will reevaluate their commitment to fairness once they understand the high price that must be paid for that commitment.

⁵⁴ "Legal analysts" are primarily legal academics, but this category includes social scientists, policy analysts in think tanks, and others. Kaplow & Shavell, *Fairness versus Welfare* (article), *supra* note 3, at 1306. Kaplow and Shavell contrast this group to ordinary citizens and to policymakers (such as legislators and judges). *Id.* at 1305, 1318.

feature of Kaplow and Shavell's theory has substantial significance. Kaplow and Shavell are very explicit that they are concerned with the evaluation rather than the making of policy:

Although our thesis is that legal policy analysts should rely exclusively on welfare economics, the important role of internalized social norms suggests that the situation of legal decisionmakers, notably legislators, regulators, and judges, is more complicated than that of legal policy analysts, who are mainly academics. The reason is that legal decisionmakers must translate the advice of the analysts into policies for which the decisionmakers are generally accountable to ordinary citizens—and citizens, in turn, may be more familiar with notions of fairness.⁵⁵

What are we to make of this claim? I will attempt to unpack the various strands of thought in this brief passage. First, Kaplow and Shavell tell us that “legal decisionmakers must translate the advice of analysts into policies.” This passage makes it clear that welfarism does not directly guide action. Rather, they imagine a three-step process. In step one, the legal analyst utilizes welfarism to evaluate policy options. In step two, the decisionmakers act on the basis of this advice. The next portion of the passage, “for which the decisionmakers are generally accountable to ordinary citizens—and citizens, in turn, may be more familiar with notions of fairness,” suggests a third step. Decisionmakers may be required to provide citizens with an explanation of their actions that differs from the actual basis of the decision.

One should not, I think, place too much emphasis on the three-step process. This is a brief passage, and may not represent a fully developed version of Kaplow and Shavell's ideas. The core notion expressed in the passage, however, is familiar from the history of utilitarianism. Indeed, a view similar to that expressed by Kaplow and Shavell has been given the derogatory label “government-house utilitarianism.” Government-house utilitarianism is the view that decisionmakers (who in the familiar British locution occupy “government house”) ought to be utilitarians, whereas ordinary people ought to adhere to a simpler set of moral norms (“internalized social norms,” in Kaplow and Shavell's parlance). Kaplow and

⁵⁵ *Id.* at 974.

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Shavell's view might be called "ivory-tower welfarism," as they seem to believe the pure version of welfarism should only be practiced by "legal analysts," that is, those who are employed by academic and similar institutions. Ivory-tower welfarism is practiced only by those who do not make policy; in other words, it is a theory of evaluation and not a theory of action. Ivory-tower welfarism pushes the locus at which the true, correct, or deep explanations are to be found from the government house to the ivory tower.

Another clarification concerns the sense in which Kaplow and Shavell are welfarists. Kaplow and Shavell are welfarists, but they are welfarists of a particular sort. They deploy a subjective interpretation of the concept of welfare. Kaplow and Shavell's conception of welfare is based solely on individual preferences among possible worlds or preference satisfaction. Recall that the form of a Bergson-Samuelson social welfare function is $W(x) = F(U^1(x), U^2(x), \dots, U^N(x))$. Kaplow-Shavell welfarism takes the form of a social-welfare function that evaluates only individual utility information.

C. An Informal Explication of the Kaplow-Shavell Proof

Having investigated Kaplow and Shavell's version of welfarism, we turn our attention to an explication of their proof that nonwelfarist methods of evaluation violate weak Pareto. The aim of Kaplow and Shavell's proof is to show that any possible theory that includes fairness as a factor in the evaluation of legal policies can yield the conclusion that we should prefer a policy that would make everyone worse off, as compared to some alternative policy. They offer both an informal and a formal version of the proof, but both versions share the same general idea and the same strategy of proof. In this Essay I focus on the informal version of the proof; elsewhere, I argue that the formal version is invalid in the technical sense that the conclusion of the argument does not follow from its premises.⁵⁶

The general idea of Kaplow and Shavell's proof is that for any nonwelfarist theory of evaluation, T , there is at least one pair of

⁵⁶ See Lawrence B. Solum, *Of Pareto and Possible Worlds: A Critique of Kaplow and Shavell's Argument for Welfarism* (2005) (unpublished manuscript, on file with the Virginia Law Review Association).

possible worlds, P and Q , such that T evaluates P as superior to Q , but each and every individual prefers Q to P . It follows that any nonwelfarist T can violate weak Pareto. Any welfarist theory of evaluation T must comply with weak Pareto because by definition all such theories are social welfare functions that (1) consider only individual welfare information, (2) consider that information anonymously, and (3) are increasing functions of individual welfare.

As I have presented it, the general idea of Kaplow and Shavell's proof omits a crucial element. How do they show that for nonwelfarist theory T there is a pair of possible worlds such that T violates weak Pareto? Kaplow and Shavell's basic argumentative strategy is to offer examples that can be generalized so as to apply to every possible nonwelfarist theory. In their informal proof, they use examples that employ an assumption of symmetry. For example, they explore the effect of a rule that requires tort compensation for negligence on fairness grounds in a world where everyone inflicts exactly the same negligent injuries as they suffer. In this possible world, compensation injures everyone. In their formal proof, they employ an example that simply assumes that everyone is indifferent to fairness and then introduces the possibility that achieving fairness imposes a cost. In other words, if for any principle of fairness there is a pair of possible worlds in which everyone is indifferent to fairness, but fairness imposes costs that everyone prefers not to incur, then complying with any principle of fairness can violate weak Pareto.

The informal proof establishes that some nonwelfarist theories can violate weak Pareto. Kaplow and Shavell believe that the formal version of the proof establishes that all nonwelfarist theories violate weak Pareto in certain particular circumstances. This is because the informal version of the proof relies on symmetrical imposition of injuries and the costs of compensation in order to generate the example. Kaplow and Shavell do not attempt to argue that every possible nonwelfarist theory suffers from the symmetry problem. In the formal version of the proof, they simply assume that there is "a good such that, if each person has δ more of it, then each person is better off."⁵⁷ They then claim that with respect to

⁵⁷ Kaplow & Shavell, Any Non-welfarist Method, *supra* note 2, at 283.

any nonwelfarist method of evaluation, there will always be a triplet of possible worlds X , Y , and Z such that the nonwelfarist method of evaluation prefers X to Y —for whatever reason is relevant to the theory. Kaplow and Shavell then claim that it will always be possible to identify Z , a possible world that is identical to Y , except that in Z , each and every person has δ more of the good that will make “each person better off.” The nonwelfarist theory will claim that X is preferred to Z , but everyone is better off in Z than in X . This violates the weak Pareto principle because that principle states that a possible world in which everyone is better off is to be preferred for that reason.

D. Weak Pareto Fails the Test of Public Legal Reason

Does Kaplow and Shavell’s proof provide a public reason for affirming welfarism? The weak Pareto principle is the normative linchpin of their argument. Recall that the weak Pareto principle can be expressed as follows: “It is never the case that a possible world P that makes everyone worse off as compared to possible world Q is better than Q .” If weak Pareto provides a public legal reason, and if all of the premises of Kaplow and Shavell’s proof are true and the proof is valid, it would follow that Kaplow and Shavell’s argument would provide both legal scholars and judges a good reason to be welfarists.

From the point of view of an ideal of public legal reason, the issue is whether weak Pareto is the kind of principle that is accessible to all reasonable citizens. Rawls himself seemed to limit the normative resources of public reason to public political values—values that can be drawn from the public political culture such as the fundamental equality of citizens. The weak Pareto principle is not that kind of value. Weak Pareto is a technical economic principle. Although weak Pareto is familiar to economists and some moral and political philosophers, it is almost unknown to citizens outside the academy. It certainly is not the kind of principle that is widely accepted by the public at large.

But this does not settle the matter. I have already established that novel reasons can be public reasons if they are publicly accessible.⁵⁸ Weak Pareto seems to rest on an intuitively plausible and

⁵⁸ See *supra* Section II.C.

noncontroversial idea—that it can never be a good idea to make everyone worse off. Even those who are unsympathetic to maximizing theories such as utilitarianism might be willing to assent to weak Pareto. Indeed, weak Pareto has the ring of an obvious truth or tautology. Why? Because if the only description of a choice available is that the choice violates weak Pareto, one would assume that the universal welfare loss would be senseless—that is, violation of weak Pareto seems to imply incurring a cost without reason.

But the intuitive plausibility of weak Pareto cannot be sustained once the full content of the weak Pareto principle is made fully explicit. The form of weak Pareto that garners very wide acceptance is something like “it is never right to make everyone worse off.” This form is different from “it is never right to act in a way that is contrary to everyone’s preferences.” Given the fact of pluralism, different citizens will understand “worse off” differently. Weak Pareto is intuitively plausible only until one specifies a conception of welfare. Once the conception is specified, then its accessibility becomes limited to those who share the conception.

Moreover, many citizens are likely to reject preference-satisfaction as the best conception of individual well-being. The objections to the preference view are well known. For example, many persons have preferences that are inconsistent with their own objective self-interests. Some people prefer to eat rich food, even though it is bad for their health. Some prefer to gamble, even though it will impoverish their families. Some prefer to drink intoxicating beverages, even though they will damage their livers.

Once the ambiguity in weak Pareto is exposed, Kaplow and Shavell’s own argument can be run against them. That is, if one takes only preference satisfaction into account in evaluating possible worlds, one could prefer a world in which everyone’s objective well-being was injured. To the extent that many of Kaplow and Shavell’s readers will affirm a conception of well-being that is not based solely on preference satisfaction, Kaplow and Shavell claim to have a form of argument that should convince the reader to reject their own theory. Indeed, one might ask Kaplow and Shavell if they would accept the principle that one should never prefer a possible world in which everyone suffers substantial damage to his objective well-being, including health, mental abilities, and resources. If they accept this proposition, then, by their own rationale, their

affirmance of welfarism is unreasonable. If they reject this proposition, one might ask them for an explanation as to why they reject it.

E. Kaplow and Shavell Rely on Dubious Modal Assumptions

It is quite striking that Kaplow and Shavell begin their proof with three premises that define the set of all possible worlds. Their own statement of their proof begins with the following three sentences:

- (1) Let x denote a complete description of the world.
- (2) In particular, x includes a comprehensive account of each of n individuals' situations and of anything that might be relevant under any method of evaluating the state of the world.
- (3) Let X be the set of all conceivable states of the world.⁵⁹

This is no accident. The crucial work in Kaplow and Shavell's proof is performed by implicit modal assumptions—that is, by unstated assumptions about what is possible. When Kaplow and Shavell claim that we can always posit a possible world where everyone gets enough of some good to make them better off, they are making a modal claim.

Possibility is a very tricky concept because any claim about possibility is potentially ambiguous. "Possible" in what sense? The possibility problem with Kaplow and Shavell's argument is that once this question is answered, it both undermines the value of the proof and poses consistency problems for Kaplow and Shavell.

How can one get a handle on possibility? One tool for removing ambiguity about possibility is possible-worlds semantics.⁶⁰ The modal assertion " H is possible" translates into the statement " H is true in some possible world." In other words, if I say "it is possible that Morse is a Yankees fan," that translates into "Morse is a Yankees fan in some possible world."

Possible-worlds semantics allows one to distinguish the various senses in which one says that " H is possible" or " J could have happened." For example, take the broadest notion of possibility, *logi-*

⁵⁹ Kaplow & Shavell, Any Non-welfarist Method, *supra* note 2, at 283.

⁶⁰ See generally John Divers, *Possible Worlds* (2002).

cal possibility. “*J* is logically possible” translates to “*J* is true in at least one possible world—that is, in at least one world in which there are no logical contradictions.” Logicians and philosophers use the word “accessibility” to define sets of possible worlds with respect to various senses of possibility. Thus, the possible worlds in which there are no logical contradictions are *logically* accessible. The possible worlds that obey the laws of science are *nomologically* accessible. The possible worlds that are consistent with everything that we know are *epistemologically* accessible. The possible worlds that share the history of the world up to the present moment are *historically* accessible. The possible world that we now inhabit is the *actual* world. The worlds that are historically accessible from the actual world are the possible worlds that share the history of the actual world up until now. Worlds that are both historically and nomologically accessible share both the history of the actual world and its natural laws.

Kaplow and Shavell’s proof relies on several implicit assertions about possibility. The most important of these is contained in the following premise of their original proof: “Construct x ” from x' by increasing each m_i in x' by a positive amount δ .”⁶¹ (The variables x ” and x' name possible worlds.) This locution is the means by which Kaplow and Shavell express the claim that for any nonwelfarist theory, there is at least one triplet of possible worlds, X , Y , and Z , such that Z is identical to Y except that in Z , each and every individual receives an amount δ of some good that suffices to make one better off. What sense of possibility is involved in this implicit modal claim?

The first sense of possibility is logical possibility. This sense is suggested by Kaplow and Shavell’s reference to “the set of all conceivable states of the world.” Although logical possibility would allow Kaplow and Shavell’s proof to go through, it creates other intractable problems for them. Once Kaplow and Shavell deploy logical possibility in their proof, they then become committed to the proposition that normative theories must hold for all logically possible worlds. But this proposition sanctions a whole host of arguments against welfarism. For example, there is a pair of logically possible worlds, one in which innocent children are tortured to sat-

⁶¹ Kaplow & Shavell, Any Non-welfarist Method, *supra* note 2, at 284.

isfy sadists and one in which they are not, such that a given consequentialist theory (for example, utilitarianism) evaluates the world in which the children are tortured as preferable to the world in which they are not tortured. This case is one of a parade of horrors used in a standard set of objections against utilitarianism. Kaplow and Shavell reject the use of these examples as unrealistic;⁶² that is, they argue that welfarist theories need only produce plausible results in “realistic” possible worlds, where “realistic” rules out possible worlds that do not satisfy unspecified accessibility conditions.

Suppose then, that Kaplow and Shavell limit themselves to what we can call “practical” possibility. They might, for example, consider only those possible worlds that are historically and nomologically accessible—possible worlds that share the history of the actual world up to now and that obey the laws of science. Now, however, there is a problem with Kaplow and Shavell’s proof. The third possible world in their proof is not historically and nomologically accessible. Recall that *Z* is identical to *Y*, the world in which some nonwelfarist consideration, such as punishing the guilty, is satisfied, except that in *Y*, each and every individual gets some good that each and every individual would prefer to receive. Where does this good come from? How is it possible that everyone in the whole world would prefer to receive more of this good? How could complying with a fairness principle (for example, by punishing one person) cause everyone in the world to lose some quantity of the good? Once we confine ourselves to practical possibilities, it is not clear that one could find even a single violation of weak Pareto—much less show that every nonwelfarist theory can violate weak Pareto. This conclusion bears repeating: *it is not clear that Kaplow and Shavell can show that any fairness theory violates weak Pareto for historically and nomologically accessible possible worlds.*

How could Kaplow and Shavell deal with the possibility problem? Perhaps they can specify a sense of possibility that cuts off the cases that are damaging to welfarism but preserves violations of weak Pareto for every nonwelfarist theory. This seems a daunting task, but even if they are able to accomplish it, they must show that the specified sense of possibility is of normative significance—that

⁶² Kaplow & Shavell, *Fairness versus Welfare* (article), *supra* note 3, at 1273.

it is morally relevant. It will not do for them to choose some arbitrary sense of possibility that does their dirty work. They must show that the sense of possibility that validates their position is not simply a post hoc fix for the possibility problem. I pose this as a challenge to Kaplow and Shavell, but, to be frank, I cannot conceive of a way in which they could meet the challenge. We may someday find that a small population of dodos still survives. With that caveat in mind, one might say that Kaplow and Shavell's proof is "dead as a dodo"—the proof does not have "live" significance for the fairness-versus-welfare debate. There is, of course, another sense in which the possibility problem is no problem at all for Kaplow and Shavell: to the extent that their modal claim is about logical possibility, the proof is valid but uninteresting.

F. The Misdescription of Deontology

Kaplow and Shavell make a subtle but important assumption about the nature of deontological or fairness-based principles. Kaplow and Shavell assume that the world is divided between two sorts of theories, welfarist theories that evaluate possible worlds in terms of individual utility information considered anonymously, and nonwelfarist theories that evaluate possible worlds by considering information other than individual utility information. This assumption is either incorrect or misleading.

Consider the set of normative theories that we call deontological. Deontological theories operate on the basis of moral rules such as "do not break your promises," "do not kill innocent persons," and so forth. That is, deontological theories impose constraints on actions or omissions by agents. Nonwelfarist social-evaluation functions operate on possible worlds and not on actions. A nonwelfarist social-evaluation function might result in the following judgment: "A possible world in which a promise is broken should receive negative ten evaluation points as compared to a possible world that is otherwise identical, but in which the promise is kept."

Deontological theories do not fit the mold of nonwelfarist evaluation functions. Nonwelfarist evaluation functions operate on possible worlds. They look at the consequences of actions from an impartial point of view, and hence they are ill-equipped for the task of constraining agents. Deontological theories look at actions

from the point of view of an agent or actor, and hence they are ill-equipped for the task of evaluating possible worlds.

In other words, Kaplow and Shavell are comparing apples and oranges. They are attempting to compare an approach to evaluating possible worlds with an approach to evaluating actions. These two different kinds of theories answer different kinds of questions. To compare them directly is to commit a category mistake, an egregious conceptual error.

There is, however, a way to compare welfarism with deontological theories. A theory that evaluates possible worlds can be compared to a theory that evaluates actions by a simple process of conceptual transmogrification. Thus, we can transform any particular theory encompassed by welfarism into a theory of action. For example, act-utilitarianism is the theory that says one should choose the action that will produce the greatest level of utility, as compared to the available alternative courses of action. For Kaplow and Shavell, the greatest level of utility could be operationalized as the classical utilitarian social-welfare function.

As demonstrated above, however, Kaplow and Shavell do not choose this route to creating comparability between welfarist consequentialism and deontology. They are explicit in stating that welfarism is a theory for analysts and not for policymakers. Rather than transform a theory that evaluates possible worlds into a theory that evaluates actions, they attempt the reverse—transforming a deontological theory into a theory for the evaluation of possible worlds. Kaplow and Shavell fail, however, to see that this transformation distorts deontology. “Killing of innocents is forbidden” does not mean the same thing as “a possible world in which killing of innocents happens rates ten points lower than a possible world in which killing of innocents does not happen, *ceteris paribus*.” By forcing deontological theories into a consequentialist straight-jacket, Kaplow and Shavell distort the theories’ essential meaning.

Kaplow and Shavell now have some fancy footwork to do. They might try casting their version of welfarism as a theory of policymaking. Then, they could argue that welfarist approaches to policymaking cannot violate weak Pareto in the sense that such approaches cannot lead to a choice that makes everyone worse off. Kaplow and Shavell then would conclude that deontological approaches to policymaking could violate weak Pareto, leading to a

policy choice that *does* make everyone worse off. At that point, however, Kaplow and Shavell will run into a brick wall. They cannot prove that every conceivable deontological theory of policymaking can violate weak Pareto, as is easily established by the following example. Imagine the following, highly simplified, deontological theory of policymaking:

Make policy in accord with the following triplet of lexically ordered rules:

- (1) Never make a policy that will result in making everyone worse off.
- (2) If (1) is satisfied, select that policy that will maximize the sphere of equal and adequate liberties guaranteed to each individual.
- (3) If (1) and (2) are satisfied, select the policy that will produce the best consequences.

Conformity to this theory guarantees zero tolerance for weak Pareto violations because avoidance of such violations is built into the first principle.

Howard Chang made a very similar criticism of Kaplow and Shavell,⁶³ and their reply to him⁶⁴ works only if they are allowed to redescribe deontology as consequentialism. Of course, Kaplow and Shavell can claim that they never intended to compare welfarism with fairness theories. They can say that their argument is only intended to compare theories for the evaluation of possible worlds and is not intended to cast doubt on deontological theories such as Kant's. This move would, however, open them to the charge that they are arguing against a straw man. Moreover, it would not save their proof, because, as I have demonstrated, one can construct a nonwelfarist theory of evaluating possible worlds that does not violate weak Pareto.

Kaplow and Shavell's misdescription of deontology is a very serious conceptual flaw in their defense of welfarism. This misde-

⁶³ Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 *Yale L.J.* 173, 214–15 (2000).

⁶⁴ Kaplow & Shavell, *Notions of Fairness*, *supra* note 2, at 240–41 (describing fairness in terms of giving weight rather than as a deontological system of rules).

scription reflects a category mistake at the core of their thinking, and correction of that mistake would require them to give up the claim that their proof is relevant to the fairness-versus-welfare debate—insofar as that debate is about live positions in normative legal theory (as opposed to hypothetical positions that Kaplow and Shavell have themselves created).

G. The Preference Assumption

The final difficulty with Kaplow and Shavell's argument lies in an assumption they make about preferences. This assumption is well hidden in their proof, and it will take some explication to bring it out. In their own statement of their proof, they state: "If F is not an individualistic social welfare function, we know from the observation that there exist $x, x' \in X$ such that $U_i(x) = U_i(x')$ for all i and $F(x) \neq F(x')$."⁶⁵

In other words, Kaplow and Shavell are assuming that on the basis of some fairness (nonwelfarist) consideration, one possible world is rated higher than another, but every individual is indifferent between the two worlds. The hidden assumption is that no one cares about the fairness (nonwelfarist) consideration. This point bears repetition: Kaplow and Shavell's proof assumes that no one in the whole universe prefers the fair possible world to the unfair possible world.

This assumption is crucial, and Kaplow and Shavell cannot reformulate the proof to work around it. If even one person cares more about fairness than about the imaginary good introduced in their proof, then it cannot be the case that the fairness (nonwelfarist) theory leads to a violation of weak Pareto. The one person who cares more about fairness than the hypothetical consumer good would be better off in the world where fairness is respected. And if even one person prefers fairness to welfare, ranking the fair world as preferable to the unfair world does not violate weak Pareto.

Kaplow and Shavell would likely concede this point. They see it as a virtue of their view that it allows fairness to be incorporated, but only to the extent that persons have a taste for fairness. But when the point is considered from a first-person perspective, the

⁶⁵ Kaplow & Shavell, Any Non-welfarist Method, *supra* note 2, at 284.

hidden assumption that no one cares about fairness begins to look like a vice rather than a virtue. Moral theories are theories about what preferences one ought to have. What should I value more highly, fairness in punishment or an extra share of some consumer good? Some moral theories may be neutral on this question, but others are not. Some moral theories say that we ought to care more about fundamental fairness than about consumption of nonessential items.

If you are reasoning about which moral theory you should adopt and hence which preferences you ought to adopt, how would you react to Kaplow and Shavell's argument, given the hidden assumption? Kaplow and Shavell tell you that *if* you reject a theory that would lead one to value fairness more than welfare, *then* the theory you reject might lead to the conclusion that we ought to make everyone worse off. However, *if* you do decide to value fairness more than welfare, *then* the theory you adopt *cannot* lead to the conclusion that we ought to make everyone worse off—because at least one person, *you*, will prefer that we do justice rather than that we give everyone a little more of some consumer good. In other words, from the first-person perspective, Kaplow and Shavell's argument is question begging. As Kaplow and Shavell elegantly put it, each of us must judge the case of fairness versus welfare. It is no argument at all to claim, as they do, that if everyone has already decided in favor of welfare, then it would make everyone worse off to decide in favor of fairness. This is a deep problem with Kaplow and Shavell's argument; once the problem is exposed, it becomes clear that their proof is utterly irrelevant to the fairness-versus-welfare debate.

CONCLUSIONS: WELFARE AND FAIRNESS AS PUBLIC LEGAL REASONS

I now return to my central claim: normative legal practice should employ the resources of "public legal reason," understood as legal reasons that are accessible by all reasonable citizens. For the purposes of this Essay, I illustrated the flip side of that claim by discussing a particular theory, welfarism, and a particular argument for welfarism, Kaplow and Shavell's "proof." But the critical implications of the argument for public legal reason are not limited to Kaplow and Shavell, welfarism, or even consequentialism in gen-

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eral. Any normative legal theory that claims to guide legal practice and relies on deep premises that are not accessible to reasonable citizens faces the same general problem—whether it be legal deontology, law as integrity, or something else. Nonetheless, the examination of Kaplow and Shavell has exemplary significance because the totalitarian ambitions of their project are so close to the surface.

Kaplow and Shavell chose to title their book *Fairness versus Welfare*. Some readers might suggest as a revised title “Philosophy versus Economics.” Both titles are mistakes because they suggest that the answer to the fundamental question of normative legal theory must be a deep theory—either deontology or welfarism or something else. But this does not dissolve the fundamental question of normative legal theory: what moral theory should guide the study of law? The answer to that question is complex. When the study of law is limited to the background culture, including the legal academic culture, the answer is that any normative legal theory is fair game, so far as public reason is concerned.

But when legal theorists seek to advise policymakers, then normative legal theory is properly constrained by public legal reason. Under those circumstances, the deep premises of comprehensive moral and philosophical doctrines should be excluded from normative legal theory. This means that the deep premises of both deontology and welfarism are properly excluded from the domain of practical normative legal theory. But the exclusion of deep premises is not the same as exclusion *tout court*. Both deontology and welfarism can offer public legal reasons as counsel to lawyers, judges, and legislators. These public legal reasons are, of course, quite familiar to the contemporary legal academy—they are the reasons of policy and principle that are the bread and butter of midlevel legal theory. In this way, the ideal of public legal reason supports both welfare and fairness, but denies the claim of either to exclude the other.

Law’s justifications should rely on normative principles that are accessible to reasonable citizens, whether they are theists or atheists, deontologists or consequentialists, moral philosophers or economists. Law’s deliberations should be shallow and not deep. *Law’s reason should be public.*