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'Economists' Reasons' for Common Law Decisions - A Preliminary Inquiry

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'ECONOMISTS' REASONS' FOR COMMON LAW DECISIONS—A PRELIMINARY INQUIRY

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I. INTRODUCTION

When judges write opinions in common law cases they frequently seek to justify their decisions not merely by citing any relevant precedent or other authority but also by setting forth what we will call 'substantive reasons'. Reasons of this kind incorporate moral, political, institutional, or other social considerations.[1] In our view, substantive reasons have primacy over appeals to authority in the common law.[2] Judges must rely on such reasons in cases of first impression, cases posing conflicts of precedent, and in cases involving the overruling or other renovation of precedent. Moreover, judges should and do advert to the substantive reasons behind precedents in order to interpret them and determine their scope.[3]

Two basic kinds of reasons of substance are to be found in common law opinions. First, there are 'goal reasons'. A goal reason derives its justificatory force[4] from the fact that, at the time it is given, the decision it supports can be predicted to have effects that serve a good social goal (in general, or at least in the particular case).[5] Here are three examples of goal reasons:

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1 Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification', 63 *Cornell L Rev* 707 (1978).

2 Id, 730–34.

3 Id, 730–32.

4 We do not canvass all the reasons why reasons are important in this article. We do assume that objectively sound reasons can be given. We also embrace intrinsic values. We are not unmindful however, that there are those who dissent (a decreasing number these days). See, e.g., Leff, 'Economic Analysis of Law: Some Realism About Nominalism', 60 *Va L Rev* 451, 454 (1974).

5. See n 1 *supra*, 735–52.

(i) Because a utility's gas reservoir *will* adversely affect the health of people living near it, the utility may be ordered to relocate it.[6]
(ii) Because the flow of information about candidates for public office *will* facilitate democracy, a newspaper that publishes falsehoods may not be held liable unless the newspaper acted in bad faith.[7]
(iii) Because allowing this kind of intrafamily lawsuit *will* disrupt family harmony generally, the suit will not be allowed.[8]

The second basic type of substantive reason to be found in common law cases we call a 'rightness reason'. A good rightness reason does not derive its justificatory force from predicted goal serving effects of the decision it supports. Rather, it draws its force from the way in which the decision it supports accords with a sociomoral norm of rightness as applied to a party's past actions or to a state of affairs resulting from those actions.[9] This force derives in a special way from how the case *came about*. Here are three examples of rightness reasons:

(i) Since the seller knowingly took advantage of the buyer's illiteracy, ignorance, and limited bargaining capability, the price he charged must be reduced.[10]
(ii) Since the owner of a boat has been unjustly enriched by the plaintiff, who found the boat adrift and, at his own expense, took care of it for the owner, the owner must compensate the plaintiff.[11]
(iii) Since the builder reasonably relied on the owner's untrue representation of fact and thereby suffered a foreseeable loss, the owner must compensate the builder.[12]

Historically, then, goal reasons and rightness reasons are the two basic types of substantive reasons to be found in common law cases. Over the past two decades, an increasing number of academics have advocated that judges *explicitly* introduce economic analysis into the decision of common law cases.[13] To date, few judges have responded.[14] Of course, in fields having to do with monopoly regulation and the like, economic analysis has traditionally been prominent in judicial opinions. But advocates of economic analysis proclaim its relevance in areas far beyond these traditional ones. Moreover, many contend not only that economic analysis is relevant to determining the most 'cost effective' *means* to given goals but that it also generates two important varieties of autonomous

6 *Romano* v *Birmingham Ry, Light and Power Co* 182 Ala 335, 340–41, 62 So 677, 678–9 (1933).
7 *Coleman* v *MacLennan*, 78 Kan 711, 741, 98 P 281, 292 (1908).
8 *Campbell* v *Gruttemeyer*, 222 Tenn 133, 137–40, 432 SW 2d 894, 896–97 (1968).
9 See n 1 *supra*, 752–74. On the relations between the two types of reasons, see n 1 *supra*, 774–82.
10 *Frostifresh Corp* v *Reynoso*, 52 Misc 2d 26, 27–28, 274 NYS 2d 757, 758–59 (Dist Ct 1966), rev'd on other grounds, 54 Misc 2d 119, 281 NYS 2d 964 (App Term, 2d Dep't 1967).
11 *Chase* v *Corcoran*, 106 Mass 286, 288 (1871).
12 *Mercanti* v *Persson*, 160 Conn 468, 478, 280 A 2d 137, 142 (1971).
13 The literature is growing rapidly. See, for example, G. Calabresi, *The Costs of Accidents* (1970); H. Manne ed, *The Economics of Legal Relationships* (1975); Posner, 'Utilitarianism, Economics, and Legal Theory', 8 *J Legal Stud* 103 (1978).
14 There is dispute over the extent to which judges *implicitly* use economists' reasons. We cannot go into this here.

substantive reasons that judges may invoke. Such reasons are autonomous in the sense that they purportedly draw upon economic theory—including welfare economics—*for goals as well as for prescriptions about means.*[15] In terms of our foregoing division of reasons into goal reasons and rightness reasons, what we will here call 'economists' reasons' consist of two distinct subclasses of goal reasons. The first of these subclasses we will call 'Pareto-superior' reasons. The second we will call 'Kaldor-superior' reasons.

In this essay we will explore the internal structure and the source of the justificatory force of the two kinds of allegedly autonomous economists' reasons and will provide a tentative critique of them.[16] Our primary focus will be on Kaldor-superior reasons, for they have the most wide ranging potential. We open, however, with Pareto-superior reasons, for to economists they are in a sense primary.[17]

II. 'PARETO-SUPERIOR' REASONS

Economists have devised criteria for judging whether a reallocation of resources is an 'efficient' means to the goal of 'welfare improvement'. One criterion (and there are many variants) is named for the Italian thinker Vilfredo Pareto, and may be called 'Pareto-superiority'. According to this criterion, a reallocation of resources is 'Pareto-superior' to an antecedent allocation if it makes 'no one worse off and at least one person better off'.[18] Of course, under the circumstances various

15 In this article we do not question the pervasive relevance of economic analysis to questions of means. This kind of relevance does not, however, give rise to autonomous economists' reasons. Further, we would caution against any form of thinking that divorces goals from means here. See generally, Fuller, 'Memorandum', in *On the Teaching of Law in the Liberal Arts Curriculum* 37–43 (H. Berman ed 1956).

16 It simply will not do to say that economic analysis is normatively neutral or value neutral. Even the supposedly least controversial economists' criterion includes such words as 'better off' and 'worse off' (though from the point of view of affected individuals).

17 The literature on economists' reasons has become quite rich of late (and there is still more in the pipeline currently). See, for example, Baker, 'The Ideology of the Economic Analysis of Law', 5 *Phil & Pub Aff* 3 (1975); Calabresi and Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', 85 *Harv L Rev* 1089 (1972); R. Dworkin, *Taking Rights Seriously,* 96–100 (1978); C. Fried, *Right and Wrong,* Ch. 4 (1978); Michelman, 'Norms and Normativity in the Economic Analysis of Law', 62 *Minn L Rev* 1015 (1978); Michelman, 'A Comment on Some Uses and Abuses of Economics in Law', 46 *U Chi L Rev* 307 (1979); Posner, 'Utilitarianism, Economics, and Legal Theory', 8 *J Legal Stud* 103 (1978); Posner, 'Some Uses and Abuses of Economics in Law', 46 *U Chi L Rev* 281 (1979); Schwartz, 'Economics, Wealth Distribution, and Justice', 1979 *Wis L Rev* 799 (1979); Steiner, 'Economics, Morality and the Law of Torts', 26 *U Tor L Rev* 227 (1976); Symposium, 'Change in the Common Law: Legal and Economic Perspectives', 9 *J Legal Stud* 189–366 (1980). See also forthcoming symposia in the *Hofstra Law Review* with Professors Michelman, Dworkin, Kronman, Baker and others as contributors.

18 V. Pareto, *Manuel D'Economie Politique* (2nd ed 1927). Of course a Pareto-superior reallocation may not be what economists call 'Pareto optimal'. It would be so only if no further reallocations could make someone better off without making anyone worse off. There are many variants of Pareto criteria. See, e.g., G. Calabresi and P. Bobbitt, *Tragic Choices* (1978).

alternative Pareto-superior reallocations may be possible, and one of these may be preferable on the ground that it makes affected persons the 'most better off'.

Now, who are the 'actors' in the social order who may reallocate resources in ways that are Pareto-superior to alternative allocations? Economists conceive the primary actors to be private parties voluntarily exchanging things in a free, competitive market. The paradigm (but not the only) Pareto-superior reallocation is one in which *both* bargainers gain from their exchange so that both are better off, and no one is worse off.

But private free market bargainers are not the only actors in the social order who may reallocate resources in Pareto-superior ways. Economists have long recognized the possibility that government agencies may also do this. And in recent times some economists and many lawyers trained in economics have come to conceive common law judges as 'resource allocators', too. On their view, a judge in a common law case *may* be in a position to endorse or bring about a reallocation. In turn, such a reallocation may be 'Pareto-superior'. When so, this reallocation generates an argument (according to some economists and some lawyers trained in economics) that the judge may adopt, as a *reason of substance* for a given decision in the case, an 'economist's reason'.

1. *Pareto-superior reasons—an example*

At least one credible example of a genuine Pareto-superior reason of substance for a common law court decision is required at the outset. The rare availability of such a reason will be apparent from the unusual nature of the case about to be posed. Let us suppose that Adam is a used car dealer in the city of Bodea and has been in business for fifteen years. Assume that fifty years ago the courts in the area occasionally responded to prosecutions of dealers who sold cars on Sunday. Usually these prosecutions were brought as common law misdemeanor proceedings based not on statutes but on court holdings that such activity is 'contrary to good morals'. No prosecution was ever brought unless a local church group filed a complaint with the local district attorney. There had been no prosecutions for twenty-five years, and in recent times Adam had heard only one report (and that ten years previous) that a church might 'start up' a prosecution. (The church ultimately did not.)

Adam regularly did business on Sunday. One day Adam decided to bring a proceeding before Judge Thomas in the local court of general jurisdiction. Adam wanted to secure a declaration that the 'common law misdemeanor' of selling cars on Sunday was no longer valid law since the public no longer viewed such activity as contrary to good morals.[19]

Adam's lawyer filed the relevant papers and served them also on the head of the local association of church groups. The latter did not respond, and did not show up at the court hearing. After the hearing, the judge declared the misdemeanor

19 We are not unmindful that this example is unrealistic in several respects. It nonetheless serves our purpose well, including the purpose of stressing the rarity of genuine Pareto-superior reasons (without compensation).

case law no longer valid. No appeal was taken. (A parallel case from another district did reach the state's highest court and that court in effect upheld Judge Thomas's position.)

Judge Thomas wrote a brief opinion in which he set forth two reasons for his decision:

> I hereby declare that the act of selling cars on Sunday is no longer a common law misdemeanor. First, it is evident that such activity is no longer contrary to good morals (if it ever was). Second, I've been reading some economics. This is plainly a case in which I may profitably view myself as an allocator of resources. If I invalidate the common law misdemeanor, I reallocate the legal liberty to the car dealers. This would, under the circumstances, be a Pareto-superior reallocation. That is, it would make some persons better off without making anyone worse off. The car dealers in this case and car dealers in future cases would be better off. So, too, would the future buyers from these dealers. All these parties would have a legal cloud lifted from their activities and certainly Adam values this. At the same time there would be no adverse effects on other parties generally within my jurisdiction.
>
> All possible affected third parties have had due notice of my proposed course of action in this case. No one objects. Furthermore, church groups who might (if anyone would) have sought to initiate proceedings by filing complaints with the district attorney do not, under the law, have a right that they may lawfully sell to car dealers in exchange for not opposing my course of action here. The law simply does not permit such a sale. Order entered.
>
> Judge Jason Thomas
> Circuit Court
> December 17, 1979

2. *The construction of Pareto-superior reasons*

The foregoing 'Pareto-superior' reason offered by Judge Thomas is one variety of such reason, namely, that which purports to improve or extend the operation of the market through a reallocation that invalidates a market restriction. There are still other varieties.[20]

For a Pareto-superior reason to be available to a judge in a case, the judge must determine that he has power to reallocate resources through a decision and its implementation. Further, the judge must determine that this reallocation is or would be 'Pareto-superior'; that is, that it would make at least one person better off without making anyone worse off. (Presumably a party might be worse off in the short run yet better off in the long run, overall, and vice versa.) The judge

20 It is not even necessary in order for a judicial decision to bring about a Pareto-superior allocation that it do so by facilitating free market exchanges among the parties or others who might be affected by the decision. Indeed, a Pareto superior move is *theoretically* possible even though it involves no voluntary bargains or exchanges whatever. All that is required by the Pareto criterion is that (i) there be a reallocation (or redistribution) of goods and resources, and (ii) that no one affected by this reallocation be worse off and at least one be better off in relation to antecedent preference rankings. All that a judge needs to know is, for example, that the parties *would* agree to reallocation were it not for some impediment, e.g., that one of them has erroneous beliefs, for example, about what his initial stock of goods and resources is. In such a case, the court can order the relevant reallocation.

might need an economist to help him make these determinations. At least three problems arise.

The first problem is that of projecting the subjective responses of affected parties to reallocations that would actually alter their stock of goods. This problem has a subjective and an objective aspect. In our car dealer example, the judge would have to inquire into the likely subjective reactions of Adam and of the church goers to the state of affairs in which the Sunday ban on car sales is lifted. He must determine whether the parties would *view themselves* as better off, worse off, or what. Economic theory, as such, tells us little about how to conduct such an hypothetical and subjective inquiry.

The 'objective' aspect of the first problem is this: There are objective constraints on just what subjective responses of affected parties are to be taken into account. These constraints are partly a matter of law. Thus a 'loser' in the Pareto analysis, for example, is someone who loses something which was 'his' in an objective sense. A person who merely thinks he owns the Brooklyn Bridge and then learns it has been 'taken away' from him is not a loser. The subjective preferences of the parties must be determined in relation to their objective stock of rights. Thus the judge is to ask: Given this stock, would they prefer an alternative stock to it? In our used car dealer case, what exactly was the legal position of the church groups prior to the decision? As projected afterwards? The answer to these questions determines the objective constraints on the subjective responses to be taken into account. Note that economics as such has nothing to say about how the states of affairs *ex ante* and *ex post* are to be defined.[21]

21 Perhaps further elaboration is called for. In general, we have an intuitive notion of what is yours and what is mine, but that may not be good enough, for a Pareto reason requires resolving close issues and doing narrow calculations in order to see whether the fundamental constraint on the availability of such a reason is violated, viz., that no one be worse off by the decision. Consider our car dealer case. We built assumptions into that case designed to avoid these problems. But imagine a slightly different case, one in which there is no settled ban on protected groups such as the churches selling off rights to bring actions for violating the Sunday law against sales of cars. There would then be more voluntary transactions (for the costs of such transactions—risk of legal sanctions—would drop). Even the church groups could get into the bargaining act and offer to pay merchants to stay closed. The merchants would stay closed if the amount offered by church goers exceeded the expected profit to be made from Sunday car sales. There is a catch, however. *Before* the court renders its decision, there were restrictions on Sunday sales of cars. Those who would be willing to pay something to keep those restrictions in place—the churches—benefitted from such laws in a simple way: They were not faced with a situation in which they would have to pay anything to preserve the restriction. The question is: Do we say that the churches, prior to the court's decision, have a right to be free from Sunday car sales (or at least that they were the beneficiaries of the law) so that *this right* is to be included in their 'trading base' for purposes of the initial allocation? Or, are we to say that the churches were merely the beneficiaries of an externality set up by the restrictions and so no better off in relation to their shares before or after the court's decision to remove the restrictions? If the former, the churchgoers would suffer a loss from judicial removal of the ban on Sunday car sales (assuming they cared) and hence no Pareto-superior reason would be available to the court. Nothing in economic theory can determine this matter one way or another. But if the very availability of a Pareto reason depends on such a determination, then in a sense, the Pareto reason cannot have justificatory force unless its presupposition is justified. But such a justification of that presupposition—the criteria we set up

A second problem is that of predicting any likely further effects of the decision beyond those that may have already figured in the characterization of projected reallocations. That is, what will be the *general effects of a rule* based on the decision? For example, how many additional car deals might be made once the restriction is lifted? Might future church members some day take a different view of whether the restriction should have been lifted so that future time additional losses will be registered (retroactively as it were)?[22]

There is a third problem. Once the effects of the reallocation are known and the subjective preferences of the parties ascertained (i.e., whether they view themselves as gaining, or losing, or what), the judge must still consider the conditions under which these preferences are expressed. Is he to count only a well informed preference? If not, then how ill informed can a preference for *ex ante* or *ex post* states of affairs be and still count? Again, economics does not appear to tell us, except perhaps to say that some choices may be 'irrational'.[23]

for determining allocations—will not come from economic theory nor from any of the values typically implicated by economic theory. This fact calls in serious question the justificatory autonomy of Pareto reasons.

Now, one might think that a simple way around this difficulty would be to let the *existing* laws of property serve to determine who has or gets what under initial and resulting allocations. But of course, that manoeuver won't work, as the foregoing example shows. Consider also cases in which property law is to be changed or is indeterminate or consider all those transactions, say in illegal goods, that do represent economic activity but in which the 'owners' of exchanged goods are not, for purposes of property law, considered to be owners or to have rights in those goods. But even if existing property law is taken to determine initial and resulting allocations, the justification for use of this criterion will be no better than the justification for that property law, and such justification will not rest on solely economic analysis, but often on policy-oriented, state-ordered distributions and redistributions.

One might be tempted to think a Kaldor reason—to be discussed later—is immune from such difficulties. But that would be a mistake. Indeed, such reasons could not avoid questions of initial allocations at least insofar as a determination of initial allocations will be relevant to determining (and setting limits on) a person's willingness to pay or what the aggregate gains and losses from the court's decision will be. And depending on our criteria, answers to such questions may be very different.

22 Of course, the churches could not reinstate the restriction later (once lifted) for there would then be losers (the car dealers) and Pareto analysis would not permit this. But the question posed in the text introduces a further fundamental kind of indeterminacy in such economic analysis: Suppose the judge knows *now* of a possible future change of mind by parties to be affected now. Should he take this into account now in determining whether there will be any losers from a contemplated decision?

23 We suggested earlier that one way in which a court decision could work a Pareto-superior allocation was that the court might order a reallocation that the parties would themselves bargain to but for one market imperfection or another that can't be overcome 'cost-effectively' in such a way that the indicated bargaining will actually occur. But what about the condition, 'would bargain to'? One is inclined to ask, 'would bargain to' under *what conditions* of information? Depending on how much information we assume the parties would have, we will get markedly different results. If we assume that the parties have too much information we may find that they would bargain differently than they would had the market simply taken its natural course, or we may even find that their whole ordering of preferences would have been different. If the parties have too little information, our results will again not track their real, informed preferences, even those that are *de facto*.

3. *Justificatory force of Pareto-superior reasons*

A reason cannot count as a rational basis for a decision unless it has justificatory force. This is true by definition. A reason cannot have justificatory force unless a genuine value figures in it. This, too, is true by virtue of our very conception of what a reason is. Reasons for acting—of which reasons for deciding are but one type—simply have no force unless they bring a value into play. Such reasons are thus quite unlike mere reasons for believing that a proposition is true.

Once a judge's projected reallocation passes muster as genuinely Pareto-superior (and as the best of any possible such reallocations under the circumstances), does it follow that the judge has a reason with justificatory force for a decision? Not without more. So far we only have what economists call an 'efficient' reallocation. We still need to ask why any such reallocation ought to exist or be brought about. We have already said that if an economist's reason is to be constructed, it must be a reason of the means-goal variety—a 'goal reason'. A goal reason is one that derives its force from the fact that at the time it is given the decision it supports will itself serve or will have effects that serve a good social goal. It follows that the immediate goal to be served by means of a Pareto-superior reallocation must, if the reason is to have justificatory force, be good in light of some relevant value or values. As we have seen, this immediate goal may be characterized as a state of affairs in which at least one person is better off by his own lights and no one worse off. Any such goal may possibly be good intrinsically. Or it may be good instrumentally because its realization is itself a means to another good goal (in general or at least in the particular case). The relevant values are, of course, not peculiarly within the economist's field of expertise. In fact, the values that must figure in a goal reason for it to have justificatory force in support of an adjudicative or other public decision are ones that philosophers, social theorists, and jurisprudents have had more to say about than economists.[24]

If one or more persons are made 'better off' and no one 'worse off', this may mean only that one or more get more of what they want (or something they want more than something they have). That is, want realization increases.[25] Such an increase might serve as our first candidate for status as a goal in our projected economist's reason having justificatory force. We may define want realization simply as that state of affairs in which an individual knowingly has his want met.

Now is want realization intrinsically good? We must not confuse increased want realization with something else that might be intrinsically good, namely increased psychological satisfaction. One may have a want met, and still, because

24 This may be thought to cast doubt on the very idea of an *economist's* reason. For when it comes to dealing with possible social goals such as net increases in psychological satisfaction, economists are head over heels in value theory, historically a well established branch of philosophy. This remains true even though economists adopt their own names (those of famous economists!) for the relevant value conceptions. More important, it remains true even though the reallocations of resources that their science is concerned with *characteristically* serve some general types of values.

25 The problem of trying to define in a fully satisfactory way a net increase in want realization is not one we can undertake here.

of many factors, not be at all satisfied as a result. In our view, increased want realization (apart from any psychological satisfaction it may bring) is not intrinsically good as such. A world in which one more want is realized would not necessarily be any better than a world in which, all other things being equal, one less want is realized. If this be so, then increased want realization alone cannot be the kind of goal that can, with other required elements of a 'goal reason', generate justificatory force.

Although the goal of want realization *per se* is not intrinsically good, it may be argued that the mere exercise of autonomous free choice often involved in want realization is intrinsically good. We do not know whether this is true. The intuition of one of us is that the mere exercise of autonomous free choice is not, as such, intrinsically good. It may be that the act of freely choosing something can, in this context, be only of instrumental value (perhaps as a means of enhancing one's satisfaction).[26]

Is the goal of increased want realization *instrumentally* good? That is, does it serve as a means to a value that is intrinsically good? Instrumental goodness is contingent. That is, whether a goal is instrumentally good depends on the value served in the particular case. Obviously many particular wants will be good or at least unobjectionable. If the wants realized that figure in the goal of want realization vary enough from case to case in whether they are instrumentally good, it simply could not be said that Pareto-superior reallocations generate a *general* reason with justificatory force. They would only generate *ad hoc* reasons with force. Yet economists' reasons are not intended to be of this merely *ad hoc* character.

It may be that a *general* economist's reason can be generated along the following lines, however. When someone gets what he wants, he will frequently feel more personal satisfaction with his life—more pleasure as Bentham put it. It may be that, in *general,* want realization is instrumentally good because it regularly produces a net increase in *psychological satisfaction,*[27] an intrinsically good goal. But is increased psychological satisfaction an intrinsically good goal? It would appear so (though there are traditions of thought to the contrary).[28] That is, a world in which one person experiences satisfaction would, without more, be better than a world in which no one does. Of course, in a particular case or even in a pattern of instances, increased satisfaction may not be a very weighty intrinsic value. The increased satisfaction might even stem from the realization of an evil desire, for satisfying an evil desire may cause no net decrease in psychological

26 To evince respect for the choices of others is something else again, but we cannot go into the complexities of this.

27 The problem of defining a net increase in psychological satisfaction is not identical to the problem of defining a net increase in want realization. At least one can *imagine* computing the intensity and number of units of psychological satisfaction of different persons and multiplying accordingly. How one might do this with respect to wants, however, escapes us.

28 It may be noted that increased psychological satisfaction may derive not only from want realization. Third parties may become satisfied from an occurrence without having antecedently entertained a relevant want.

satisfaction (although it generates a rightness reason *contra*). Still, in our view, the goal of increased satisfaction served instrumentally by increased want realization is good, and thus a reason in its name has force that *may* justify a decision. In the absence of countervailing reasons, a decision based on such a reason would be justified. On this, more later.

4. *Availability of Pareto-superior reasons*

The main types of common law cases of relevance here are four fold. First, there are many cases where the court is not faced with whether to make new law but must determine who has the right in question in light of complex or apparently indeterminate case law. Once the judge hears the case and appropriately deliberates, it will become clear which party had the right all along. This we may call the 'particularizing' case. Since the judge is simply deciding who has the right, not deciding whether to make a change from a status quo, a Pareto-superior reason would be irrelevant, for it is relevant only to justify a change (where at least one person would be better off and no one worse off), or to justify not making a change (where no one would gain or someone would lose).[29]

Second, there are cases where the court is faced with whether to make new law by overruling or modifying an existing right. Here we assume that the case law more or less plainly confers the right on one of the parties, subject to the standing possibility that a future court may overrule or modify the case law from which the right derives. We will call this the 'overruling' case. Our used car dealer example was such a case, and there we saw that a Pareto reason to overrule arose because, on the facts of the case, some would be made better off and no one worse off. That is, the losers (the church goers) did not object to the loss of their right. But this is far from the typical case. Typically, the projected overruling or modification of existing case law deprives the loser of a valued right.[30] When so, the court cannot give a Pareto reason to justify the projected new law for someone will be made worse off. It might be said that a Pareto reason nonetheless arises *against* overruling in the typical case, and that this 'saves' the relevance of such a reason. But if typically in such a case the Pareto criterion opposes overruling (because there would be a loser who would be worse off), then the utility of such a reason is strikingly limited (because of single- rather than double-edged potential) and is an essentially conservative justificatory resource at that.[31]

29 Of course, if the Pareto criterion has *already* been adopted in a relevant common law precedent, then it would become a relevant part of the justificatory analysis, even in a 'no change' case.

30 We should distinguish two senses of 'loser'. A person may be a loser in court without being a loser in relation to what he had initially. These are not, of course, identical. A property claimant, for example, may 'lose' in court, but it may be true that he never really had a good claim, and hence is not a loser in relation to what he had initially.

31 It is sometimes suggested that *if* courts were to require winners to pay compensation to all losers in, for example, overruling cases, after the compensation is paid, we would have a state of affairs that would be equivalent to a Pareto-superior one (provided costs of exacting and paying the compensation did not wipe out the gain). In this sense, there might be many Pareto-superior reasons. As we will later see, however, economists do not, *qua* economists, even claim that such losers are actually to be compensated. See also n 50 *infra*.

Third, there are cases of 'first impression' in which the court must create law. In a 'full fledged' such case, neither party in question has the right. Here, the court might be able to assign the right in a way that makes both parties 'better off' as compared to their antecedent 'zero' positions (or even something better). In that event, the Pareto analysis might generate a reason for decision. But more often, cases of first impression will be matters of degree, depending on the closeness of analogies within existing law. Thus cases of first impression often overlap with 'overruling' cases. When so, there will be losers. Or at least the antecedent legal status quo will not be a well defined state with which to compare projected Pareto reallocations to determine any gains and losses, and thus the outcome of the Pareto analysis will be indeterminate.

Fourth, there are cases where prior case law is in conflict. Usually, no Pareto reason can arise here, for there is either no well defined status with which comparisons can be made (as above), or there will be losers (if either of the parties is assumed to hold the right in question to any degree).[32]

One way to try to resurrect the relevance of Pareto reasons in the second, third, and fourth types of cases, would be to call upon the judge to ask whether, in each such case, there is a *rule* that, in advance of the actual dispute, the parties could have agreed to for the resolution of any such disputes, should they arise. If so, then that rule, as the Pareto-superior rule, should control. This, of course, would call for Pareto analysis, but it would also call for the judge to abandon traditional common law method and decide cases speculatively in accord with hypothetical antecedent agreements of the parties.

5. *Pareto-superior reasons—a summary assessment*

What we here call Pareto-superior reasons qualify as economists' reasons *par excellence,* if any reasons do. They flow out of standard economic theory. Virtually all economists embrace, in some way, the idea of Pareto-superior reallocations. Yet we have seen that a Pareto-superior reallocation only contingently generates a reason. It generates a reason only if it brings a net increase in psychological satisfaction, and it does this generally (rather than *ad hoc*) only insofar as we assume that want realization generally serves the further goal of increasing psychological satisfaction.

Further, for the justificatory purposes of judges, the key concept of Pareto-superiority is not well defined. The principal indeterminacies are these: nothing in economics specifies what we are to count as the *ex ante* and *ex post* states of affairs to be compared. Also, economics does not specify the conditions of information under which stated preferences qualify.

In addition, economics cannot tell a judge how to determine reliably the likely subjective responses of parties hypothetically affected by projected reallocations.

Finally, Pareto-superior reasons will *rarely* be available to a common law judge anyway.

32 Of course, there are borderline cases and we do not claim that all common law cases fall neatly within our four categories.

III. 'KALDOR-SUPERIOR' REASONS

This kind of reason derives in part from a reallocation of resources that is 'Kaldor-superior'. Such a reallocation is one in which, unlike in a Pareto-superior reallocation, there is a loser as well as a gainer but the gainer's gains are such that he *could* compensate the loser and still have some gain left.[33] Economists do not, however, require that actual compensation be paid. Merely because the gainer thus gains more than the loser loses, economists view a Kaldor-superior reallocation as an 'efficient' means to the goal of welfare improvement, and thus recognize a further basic type of economist's reason.

Far fewer economists subscribe to the Kaldor than to the Pareto criterion of efficient resource reallocation. This is largely because many are averse to making 'interpersonal comparisons'.[34] As we shall see, to apply the Kaldor criterion most faithfully, it would be necessary to determine whether the gainer really does gain more than the loser loses, and thus necessary to compare gains and losses of different persons whose preference intensities for the same things almost certainly differ; and economists frequently proclaim that it is not clear how this can be done.

Nonetheless, some economists do go in for Kaldor-superior reasons. And so do some law professors trained in economics, even in fields far outside monopoly regulation and the like.[35] This is not to say common law judges generally resort to such reasons.[36] At least, they rarely give them in explicit terms. Whether they implicitly do so is a matter for debate (beyond the scope of this paper).

In the usual dispute before a common law court, there will be a prospective loser as well as gainer. As we saw, a Pareto-superior reallocation contemplates no losers. Thus the Kaldor criterion (gainer gains more than loser loses) can be satisfied although the Pareto criterion (some one better off and no one worse off) cannot be satisfied.

1. *'Kaldor-superior' reasons—some examples*

The following hypothetical examples provide concrete illustrations of purported Kaldor reasons. Although highly simplified, the examples remain generally realistic, except that in each it is assumed the judge decides solely on the basis of the economist's reason arising out of the justificatory resources of the case.

33 We name this reason for the economist Lord Kaldor. See Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility', 49 *Econ J* 549 (1939), in which the 'Kaldor criterion' (gainers gain more than losers lose) is set forth. Today, the criterion is also sometimes called the 'Kaldor-Hicks criterion'. See Hicks, 'Foundations of Welfare Economics', 49 *Econ J* 696 (1939).

34 For a classic statement of this aversion, see L. Robbins, *An Essay on the Nature and Significance of Economic Science* (1935). See also Harsanyi, 'Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility', 63 *J Pol Econ* 309 (1955).

35 See sources cited in n 13 *supra*.

36 We do not hold that common law courts are not interested in net increases in the satisfaction of individuals! Courts do decide cases on the basis of such notions as 'freedom of contract', 'family harmony', 'public convenience', and 'smooth labour-management relations'.

Plainly, an economist is not committed by any reason that his discipline may be thought to generate, to recommending that judges decide cases solely in light of that reason. Also, although all the examples involve 'winner take all' results, nothing in economic analysis requires this.

(i) *A simple property case.* Stakeholder has been caring for a semi-wild animal. Edgar claims title to the animal under some old case law, Edgar having coaxed it off Betsy's land. Betsy claims title, too, it having been born on land owned by Betsy. Assume that by the doctrine of relativity of title, Edgar and Betsy's claims are superior to those of all other parties. Stakeholder turns the animal over to a small claims court and interpleads Edgar and Betsy. The judge determines that Betsy would be willing to pay $150 for it (as it fits into her technological research work), but Edgar would be willing to pay only $100 for it (as he wants it merely for a pet). It is assumed that Edgar and Betsy are not able to bargain with each other successfully.

Judge Wendt awards title to the animal to Betsy and gives the following reason of substance:

> This is a case of first impression. By the Kaldor criterion, Betsy wins. Betsy would be willing to pay more for the animal than Edgar—she would be willing to give up more purchasing power to get it. That is, Betsy would gain more in getting it (by $50) than Edgar would lose in not getting it. Thus awarding the title to Betsy is an allocation that is Kaldor-superior. Betsy therefore prevails. (Of course, Betsy need not in fact pay anything into court for the animal, other than Stakeholder's feedbill.)
>
> I admit that I have applied the Kaldor criterion directly to the facts of this particular case. But I find (on the basis of further evidence in the record) that I would reach the same result if I were to apply it to proposed alternative rules for such cases, too. That is, I find that gains would likely exceed losses more if, *ceteris paribus,* the one who plans to use an animal (born in such circumstances) in his or her own productive activities gets it. Under this possible rule, the Betsys of the world would be the ones who would, as a class, pay more, and thus should win. Now, it will not always be true that we get the same result regardless of whether the Kaldor analysis is applied directly to the particular case or is applied to alternative general rules. It all depends on the facts. But when we can state a rule we should do so. This directly puts the rights into the hands of the class that values them the most and saves transaction costs this class would have to expend to buy the rights from others. It also saves costs of case-by-case inquiry and dispute resolution.[37]

(ii) *A simple tort case.* Mr. Upland and Mr. Downland owned adjoining suburban realty. Upland blacktopped some of his realty, and the benefit to him was worth $1000. As a result of the blacktopping, however, water unforeseeably ran off during rainstorms in rather larger quantities than previously and the first significant run off caused $3000 in damages (repeatable). It would cost Downland $500 to prevent these losses. These parties found that they could not bargain and thus settle their differences. Downland then sued for compensation. Assume that

37 See also *Jean* v *Foto* text 227–229 *infra.*

no facts were available as to the likely effects of alternative possible *rules*. Judge Frank decided the particular case in favour of Upland and reasoned as follows:

There is no governing common law rule in our jurisdiction. I decide for Upland. Downland should have no right to compensation here, and should take precautions to prevent loss in the future. That allocation of resources in which Upland has the right to let water run off freely would be Kaldor-superior. According to the evidence, it would have cost Upland $1000 to prevent loss from such run offs in the first place (before blacktopping, and perhaps even more now). It would cost Downland only $500 to prevent loss. Upland would be willing to pay a sum up to the $1000 it would cost him to avoid the $3000 loss sustained by Downland in order to get the right to let water run off freely, whereas Downland would be willing to pay no more than $500 to have the right to be compensated for future water-caused losses, since he could prevent them for $500. It follows that Downland is the 'cheaper cost avoider'. Hence, Upland would gain more than Downland would lose if Upland were given the right to let water run off freely and Downland were denied a future right to compensation. Thus it will be Kaldor-superior for Upland to win, and I award the right to Upland. The parties have demonstrated their inability to bargain, and in any event, it would save them the costs of bargaining if I award the right as here. (I say nothing of the $3000 loss sustained by Downland in this case of first impression.)[38]

(iii) *A price fixing case.* Two major producers serving an area collude and fix prices of their product. Consumer, who has bought at the higher price, later learns of the fixing and sues to halt it, to collect damages, and to have a fine imposed. Judge Thomas rules as follows:

Consumer wins on the basis of Kaldor reasoning. We have a flat rule against price fixing, even though sometimes price fixing may not be anti-competitive. Without price fixing, consumers would generally gain more than producers lose, and it is not cost effective to inquire into the possibility of pro-competitive effects in every case. Now, let me spell out why price fixing is generally not 'Kaldor efficient', to use economists' language. Price fixing usually is at prices above competitive levels. Where this is so, consumers are led to buy alternative goods. Assume these alternatives are of the same quality as the price fixed goods but cost more to produce than the price fixed goods and thus are priced (even at competitive levels) higher than the price fixed goods would be if the latter were sold at competitive prices. Here, it is possible to achieve the same benefit level at lower resource cost. Consumer demand can be satisfied at lower resource cost by making and selling more

38 The *Upland* v *Downland* case introduces what some economists call the 'cheaper cost avoider' principle: Downland is the cheaper cost avoider so Downland must bear the cost. This terminology, however, is misleading. It will not do merely to impose the cost on the cheaper cost avoider (Downland) without further inquiry into gains. In fact, the imposition of such cost on Downland would not be justified on economic analysis unless the benefit to Upland of blacktopping his driveway exceeded the cost to him of putting in the blacktopping *and* the external harm (or cost of avoiding such harm) to Downland. Otherwise, people like Upland could engage in activities of very low benefit to themselves and at the same time impose huge external costs on other parties merely because those other parties happened to be those who could most cheaply avoid the external harm generated by such activities. That would be the case here if the value to Upland of the blacktopping were only a few dollars more than the cost of its installation, *plus* the costs of most cheaply avoiding resulting harm.

of the goods the price of which has been fixed. The gain to consumers will exceed the loss to producers, now and in the future. Consumer prevails, and fine to be imposed accordingly.[39]

(iv) *Transaction costs.* Our examples thus far have generally neglected the bearing of what economists call 'transaction costs'. To remedy this, we now offer a further example (discursively rather than in the form of a hypothetical court opinion).

Assume that Foto took Jean's photo without her consent and used it to advertise his cereal products. Jean sued Foto for invasion of privacy. Assume an old precedent rather clearly denies a right of privacy in similar circumstances. The legal issue before the court is whether, in light of Kaldor analysis, to overrule the precedent and recognize a right of privacy in Jean.

(*a*) Let us suppose that our judge takes testimony and other direct evidence on whether a decision overruling the precedent and recognizing a right of privacy in Jean *in this particular case* would be Kaldor-superior and concludes that it would be. That is, on applying Kaldor analysis directly to the case (rather than to a proposed rule), he concludes that in light of Jean's willingness to pay, Jean would gain enough so she could compensate Foto and still have something left. Without more, the judge would decide for Jean.

(*b*) Our judge should, however, also consider whether the *class* of Jeans would also be as likely to gain as would Jean and if he so found, the judge would lay down a *rule* reassigning the right to the Jeans of the world. (Of course, there might be something special about Jean's particular case, and the judge might find that in general the Fotos would lose more than the Jeans would gain, in which event the judge would not overrule the old precedent but would leave the Fotos with the right.)

One economic advantage of adopting a rule rather than merely resting with *ad hoc* decisions in each particular case is, of course, that this would save costs of such particular inquiries in future cases. Moreover, such a rule would *generally* put the right in the hands of parties who value it most and thus would save transaction costs they would otherwise have to incur to buy the right were it assigned to the other class of parties. Rules structure incentives – people can act on them to realize gain. But there is still more.

(*c*) There are further steps the judge should consider which might alter the result so far provisionally reached, and here transaction costs come in again. Let us suppose the judge makes further inquiry and concludes that whichever way he assigns the right, there will still be some, perhaps much, bargaining over it. In our example, if the Fotos are, on Kaldor analysis, allowed to keep it, *some* Jeans will still buy out Fotos, for even though Fotos as a class value it more, some particular Jeans will value it more than some particular Fotos. Or, if on Kaldor analysis the right is assigned to Jeans, some Fotos will buy out Jeans, for again, although the

39 Why a 'monopoly' case? Of course, at least in the United States, such a case would qualify in a somewhat extended sense as a 'common law' case. But more pertinently, the case illustrates an economist's reason in its most robust and indisputable form.

Jeans as a class value it more, some particular Fotos may value it more than some particular Jeans.

Moreover, since the judge has decided that the case is one in which such bargaining transactions as the foregoing will occur, he will also want to consider whether whichever way he assigns the right will *itself* reduce the costs of such bargaining. For if that happens to be the case, he will want to consider these cost savings in the overall picture in deciding what *rule* to adopt. (Such savings also make more transactions likely, too, and this brings gains.)

To illustrate: Contrary to the assumptions of our example thus far, let us assume that our judge has provisionally decided up through steps (*a*) and (*b*) not to overrule but to reaffirm the right of the Fotos of the world to take and use photos without consent of the Jeans; all this, of course, on the ground that if the right were given to the Jeans, they would *not* gain enough to be able to compensate the Fotos and have something left. Now, on further analysis, however, let us suppose that (1) whichever way the judge assigns the right, there will still be a significant number of buy outs (that is, there will be further trading in the right), and (2) there will be a substantial reduction in transaction costs if the right is assigned to the Jeans. The *former* kind of determination is easily enough imagined in this context. Thus we may imagine that if the right of privacy is denied to Jeans, some Jeans will care enough to buy back the right in some circumstances. And it is easy to see why, if a right of privacy is recognized, some Fotos would want to buy it. The *latter* kind of determination is also very easy to grasp on the facts of the foregoing case. We need only to assume that if a right of privacy were assigned to the Jeans, it would be much easier and therefore less costly for the Fotos to identify and interact with any particular Jeans they wish to photograph for they would know what persons these were, than it would be for the Jeans to seek out prospective photographers and make deals with them in advance (assuming the Fotos had the right).

The foregoing saving in transactions costs from recognizing a right of privacy in Jeans could be large enough to offset the margin of gain (including the saving in transactions costs from the Fotos not having to buy out Jeans) that led the judge provisionally to reaffirm the right in the Fotos in this version of our example. This could be true even though with Jeans having the right of privacy, many more Fotos will buy out Jeans (because as a class they value the right more, on our assumptions) than Jeans would buy out Fotos.

Of course, this step (*c*) could not alter the overall result in any case in which once the right is reaffirmed or reassigned there will be no future transactions in it because it has once and for all reached its most highly valued use. For example, it might be that the Jeans feel so strongly about privacy that very few if any would ever sell their right. Or it could be that they really don't care, in which event the right would remain forever with the Fotos if once so assigned.

(*d*) Now, let us suppose the judge cannot determine which *class,* Jean's or Foto's in our example, values the right more under step (*b*). Would it follow that the judge should simply rest with step (*a*) and assign the right to the one of the

two particular parties who happens in that case to value it the most, and not lay down a rule? No. Again, it might be that the judge would find that there is trading in the right, and although he does not know in general which class values the right the most, he can, under the circumstances, make this trading much less costly by overruling and recognizing the right in the other class. That is, the general savings in transactions costs could offset the projected Kaldor gain from the mere *ad hoc* assignment of the right in this particular case.

Of course, if there is *no* difference in transaction costs from the alternative assignments, this step becomes inconsequential (unless the judge has other means of affecting transaction costs).

2. *The construction of 'Kaldor-superior' reasons*

First, the judge must identify alternative decisions. The *law itself* may constrain the nature and range of these alternatives. For example, traditionally in common law cases there is one winner and one loser and the winner 'takes all'. Also, any rule arising from the decision would operate similarly in the future. For example, in *Jean* v *Foto* cases, one party would simply get the right of privacy or not get it. In the *Edgar* v *Betsy* type of case, one of the parties would always get full and exclusive title to the animal. Upland would win all or lose all. The price fixers would either win all or lose all. Again, nothing in economic analysis requires such all or nothing solutions, however.[40]

Second, the judge must determine (so far as is 'cost effective') the allocative effects of each legally permissible alternative decision *on each person affected* by the law suit. Such persons include parties to the suit and, presumably, third parties in the zone of effects. They also include future similarly situated parties to whom any projected *rule* of decision in the case at hand would apply in the future, for as we have demonstrated in several of our examples, it is always possible that special economic gains (in addition to legal ones) may be derived from proceeding by rule rather than *ad hoc.*[41] Again, economics does not itself state who has what *ex ante* or *ex post.* The judge must turn to the law and other sources to determine as much.[42] At the same time, he must decide which parties and other persons gain and which lose on each alternative in order to come up with an *ex post* characterization. This might, as in the price fixing case, call for the application of sophisticated 'price theory'.[43]

Third (or as a part of the second step), the judge must address himself specifically to the 'transaction cost' effects of alternative decisions. As in the *Jean* v *Foto* case, he must consider whether after each alternative decision or rule there is likely to be trading in the right involved, and if so, whether one alternative decision or rule might itself reduce the costs of such bargaining more than others.

40 See Brown, 'Toward an Economic Theory of Tort Liability', 2 *J Legal Stud* 279 (1973). See also, Coons, 'Approaches to Court Imposed Compromise', 58 *Nw L Rev* 750 (1964).

41 See our discussion of the *Jean* v *Foto* case at text 227–229 *supra.*

42 See n 21 and accompanying text *supra.*

43 For a tiny sampling of the flavour of such analysis, see the price fixing case at text 226 *supra.*

Fourth, the judge must measure the allocative effects thus far determined and translate them into a common unit of measurement. The judge can then meaningfully state whether and how much gainers gain and losers lose on each alternative. The judge would want to know not only the measured effects in the particular case but also (if possible) the measured effects of alternative *rules* for such cases. (Statements of transaction cost estimates may already be in appropriately 'measured form', e.g., in legal tender.)

Proponents of Kaldor reasons generally recommend that gains and losses be measured by reference to the *hypothetical willingness of the parties whose interests are antagonistic to pay in legal tender for the right to the resource in issue or to pay to avoid the money costs attendant upon not having the right to that resource.* We will call this the 'willingness to pay' criterion.[44] It is not the only solution to the problem of devising a method for measuring projected gains and losses,[45] but it does *apparently* enable the judge to avoid making interpersonal comparisons in determining such gains and losses (at a price, as we will see).[46]

Thus, for example, in the *Edgar* v *Betsy* dispute over title to the wild animal, a judge who invokes the willingness to pay criterion to measure gains and losses asks how much each affected party (as individuals and as members of a class to which a rule would apply) would be willing to pay (in money) to have the animal. We assumed Betsy would pay $150 and Edgar $100. That is, Betsy would be willing to give up $150 in other combinations of goods—say a $150 set of phonograph records, or any other things priced at $150. Edgar would only pay $100, and thus would only be willing to give up other real things purchasable at $100. The *Downland* v *Upland* case illustrates how the willingness to pay criterion works where what is being paid for is the right to avoid incurring a cost. Upland would, as we saw, be willing to pay $1000 to avoid a $3000 loss. Downland would be willing to pay no more than $500 to avoid a $3000 loss, for he could prevent such losses for $500. Hence Upland values the right in question (the right to let water run off freely) more than Downland values the right to preclude the run off.

It should be evident that the foregoing 'willingness to pay' calculus is not carried out in terms of some objective or socially specified standard of valuation. Rather, it is carried out with reference to the subjective valuations of the affected parties or projected classes thereof as expressed in monetary terms, i.e., in relation to other things the parties think they could buy with the same monetarily stated units of purchasing power.

One important theoretical complication concerning the use of willingness to pay in money as the measure and means of valuation should be noted here. Money (or

44 The willingness to pay criterion is deployed over a wide range of contexts in R. Posner, *The Economic Analysis of Law* (2nd ed 1977).

45 An alternative would be to apply the Kaldor analysis *directly* to determine satisfaction, contentment, utility, or whatever. To do this a judge would, of course, have to adopt some uniform unit of measurement (among other things).

46 See text between nn 52 and 53 *infra.*

more precisely, individuals' stated or projected valuations of resources in terms of a common monetary standard) is used to determine gains and losses in constructing economists' reasons partly because money can be used in markets to obtain many different goods and services. Thus in a sense, a monetary standard can be used to compare conveniently a person's valuation of a certain quantity of apples and oranges, or of virtually anything else. Thus, when a person says that he values, as in Edgar's case, a certain animal at $100, he is saying that he values that animal the same as he values any other combination of goods that can be acquired (in some market at some prevailing price) for $100. Money thus serves as a standard by which one sort of good can be 'translated' into another at set quantities determined by a market.

However, on careful consideration, a person's *stated* valuation or preference in dollar terms is only an imperfect approximation of his real valuation of resources, which real valuation is at bottom the theoretical target in an economist's reason based on willingness to pay.

How so? The economist's reason is relativized to a certain class of parties (possibly at a certain time, but we shall ignore that complication). Let us simplify things and assume that, as in the case of Edgar and Betsy, we are trying to determine the monetary valuation of a single good or resource by two parties. Each honestly states his valuation of the resource in legal tender (or we evaluate evidence as to what their honest statements of valuation would be). Now, in order for these valuations in legal tender to serve as input to our economist's reason, several assumptions have to be made. For example, we must assume that (i) there is a relevant (prevailing, available) market within which all combinations of goods can be given or have a price, and (ii) that the parties' statements of monetary value of the resource in question sufficiently reflect *for them* the other combinations of goods that they could get for the same amount in the prevailing market. What this really means can be illustrated as follows: If we ask Edgar how much the animal is worth to him, suppose he says $100. But suppose that it has slipped his mind (or he did not know) that at prevailing prices he could buy 20 bottles of his favourite wine (which he really loves) for $100. But Edgar is not indifferent as between that quantity of wine and the animal—he would much rather have the wine. In that case, Edgar's (honest) statement of $100 for the animal is an over valuation. An under valuation might occur if Edgar was not really in touch with what combinations of goods $100 will buy, if, for example, he had been isolated lately and had failed to take account of inflationary changes (dimunitions) in the value of money in terms of combinations of other goods. In either case, if we use Edgar's statement of monetary valuation for the animal as input to a Kaldor reason, we shall thereby be building an inaccurate measure of Edgar's real 'economic' valuations into that reason, i.e., his valuations of the resource in question in terms of other combinations of goods.

Actual market prices for resources will only rarely (if ever) be equivalent to the maximal worth of those resources as defined above. When a court sets out to give a Kaldor reason, then the maximal worth of any affected resources (determined on

the basis of the 'willingness to pay' criterion) will be relativized to those parties that might be affected by one or more of the alternative decisions. Where the only persons to be affected by a court's decision are A and B and the only affected resource is R, then even if R has an actual market price, it will still be necessary for the judge to determine or estimate what A and B are willing to pay for R.

Willingness to pay in money, then, is the measure of resource worth to the parties that the judge is to use. Note that this criterion rests on, among other things, *ability* to pay. Also, willingness to pay is most likely to approximate a party's real subjective valuation of a resource when that party is already consuming the good and there are market prices not only for the things to be given up but also for the resource involved. Thus in *Edgar* v *Betsy*, not only might there be any number of combinations of goods priced in the market at $150, but the animal itself might also have a ready market price, say $150. Let us suppose, however, that while the animal would sell on the market at $150, it is at the same time one for which Edgar has special affection. In principle, there is no reason why *this* 'non-market' private value could not be expressed in monetary terms. In that event Edgar would (if he can afford it) state his willingness to pay at something more than $100. Or to pose a variant of this problem in another context, suppose in the case of *Downland* v *Upland,* Downland thinks that it would be very *unfair* of Upland not to share part of the $500 cost of putting up a barrier to prevent run off water from causing damage to Downland's property. In principle, this 'non-market' personal value could be monetized and factored into the calculus as a 'demoralization' cost which Downland would be willing to pay something to avoid. Still, to the extent that non-market based monetizations of payments or costs or both figure in the calculus of gains and losses, the real subjective valuations of the parties are likely to be less accurately represented.

We have earlier explored the extent to which the willingness to pay criterion may fail to reveal the true *economic* valuation of the parties. We will now note several other difficulties with this criterion.

The first problem concerns what some theorists call the 'wealth effect'.[47] In trying to determine a party's valuation of a resource on the willingness to pay criterion, there are two seemingly equivalent questions a judge might put to the relevant party: (1) What is the maximum amount you would be willing to pay to get that resource? (2) What is the minimum (the least) amount you would demand in order to give up that resource? The problem is that the answers to these questions may not be the same, even for the same party. Indeed, if the value of the affected resource comprises a relatively large part of a person's net wealth, his answers to the above two questions are likely to differ significantly. To see why this is so, we must distinguish two sorts of case. Suppose that the resource in question is a $200,000,000 yacht, and we put question (1) to Edgar. Unfortunately, Edgar's net wealth is $2000. But suppose we now put question (2) to him. Our question presupposes (perhaps contrary to fact) that Edgar has such a yacht. And Edgar

47 See, e.g., Baker, 'The Ideology of the Economic Analysis of Law', 5 *Phil & Pub Aff* 3 (1975).

must reach an answer that he would give were that supposition correct. But in that case Edgar is not limited by his actual net wealth, for our very question hypothetically adds the value of the yacht to his wealth. This is the first sort of case. The second sort of case arises when the answer Edgar might give to question (1) is within the limit of his ability to pay. In such cases, his answers to (1) and (2) may still differ significantly. This is because, in general, the marginal utility of wealth or income decreases. If we put question (1) to Edgar this time, we are in effect asking him how much of his first $2000 of wealth he would give up to obtain resource R. Let us say that his answer is $1000, certainly within his ability to pay (if he efficiently liquidates 50% of his assets). But now suppose that he already has R and we ask him how much he would require to give it up. This is our question (2). His answer is likely to be somewhat more than $1000. This is because any sum he would receive to give up R is an added increment to his first $2000 of wealth. In this case, an offer of $1000 might not be sufficient, for this offered $1000 is (or would be) Edgar's third $1000 of wealth, worth somewhat less to him than his second or first $1000 of wealth. It was those first two $1000 increments that we were asking Edgar to 'dip into' when we put question (1) to him.

It might be argued that the wealth effect does not in fact pose an insurmountable problem for economic analysis and for use of the willingess to pay criterion in determining the parties' economic valuations of resources. For there is a more or less natural way for a judge to decide which question, (1) or (2), he should ask each party. Thus, with Richard Posner,[48] the judge must ask question (1) if the resource is not owned by a party, and question (2) if in fact he already owns it. This seems to be the 'natural' choice simply because we want our valuations to be determined with reference to the stock of resources that a party actually has.

However, there may remain a problem in many legal cases. For example, if we recall the *Edgar* v *Betsy* case, one (perhaps the best) explanation of why Edgar and Betsy are in court in the first place is that each mistakenly believes that he owns the animal outright. But if that were really the case, then it is likely that the court would award the animal to the owner. Why? Because if, for example, Edgar owned the animal (and this was settled in prior law), the uncertainty and consequent costs that would be generated in the market at large in light of the fact that a settled property right had been obliterated would probably cancel any excess gains to Betsy that would accrue simply because she was willing to pay more for the animal. Thus, the court's decision (as set out in the example) may well presuppose that, under existing law, property rights in the animal are indeterminate or at least not settled. But in that case, which of our two questions is our judge to pose to Edgar and Betsy to determine their valuations appropriately? The answer is not clear. If a judge has to choose which to use (because neither party's property rights in the most immediately affected resource are clear or settled), the judge cannot follow the 'natural' routes above, and there

48 'Utilitarianism, Economics and Legal Theory', 8 *J of Legal Stud* 103, 119 (1978).

may well be differences in the two measures. So, in a sense, the problem remains. How important it may be in practice remains to be seen.[49]

As we have already observed, the willingness to pay criterion is hypothetically applied. That is, in *Edgar* v *Betsy,* the judge only asks what the parties *would be* willing to pay for the animal. Similarly, in *Downland* v *Upland* he asks only what the costs to the parties *would be.* The judge does not require that the payments actually be made or costs actually incurred. This, of course, injects evidentiary uncertainties into the calculus of gains and losses—ones which the discipline of economics does not address. Nor does economics specify the conditions of information under which willingness to pay is to be determined.

Fifth, the judge then identifies all gainers, enters their respective gains, and then identifies all losers and enters their respective losses for each decisional alternative. Of course, he takes into account transaction cost effects, too. He thereafter determines whether on any alternative the reallocation involved is Kaldor-superior—that is, whether the gainers would gain more than the losers would lose. He determines this not only for the particular case but (if possible) for alternative rules for such cases as well. If more than one alternative provides a Kaldor-superior result, the judge chooses the one *most* Kaldor-superior. And in general, if a rule can be formulated, he will prefer that to a mere *ad hoc* decision. Of course, it is costly to gather information to construct a rule, and this is a cost that must be counted too.

In the writings of proponents of Kaldor reasons it is sometimes unclear whether a judge is to take into account general third party effects—'externalities'. These could either increase or decrease satisfactions. If, for example, in the *Jean* v *Foto* case, the judge only considers the willingness to pay off Jeans as a class and Fotos as a class, this would exclude general third party effects. Thus the Jeans might prefer privacy more than the Fotos prefer having the pictures. Yet millions might derive satisfaction from seeing pictures of Jeans on cereal boxes, and some or all of this might not show up in the gain to Foto, for it alone might not help sell cereal.

But so far we have only identified a number of steps that a judge must confront in determining whether an alternative involves a reallocation of resources that would be Kaldor-superior, where the determination of an excess of gain over loss is made in terms of willingness to pay for the resources (or to avoid a cost), stated in money. Even if a reallocation is thus 'superior', it does not follow that this, as such, would generate a reason with genuine justificatory force.

IV. A PROVISIONAL CRITIQUE OF KALDOR-SUPERIOR REASONS

Having provided a general account of Kaldor reasons as might be invoked in common law cases, we now turn to our critique. This critique is provisional in the sense that we wish to reserve our final overall assessment until the law acquires

49 A further problem with the willingness to pay criterion arises because of the 'Kelman effect' which, however, we do not explore here. See Kelman, 'Consumption Theory, Production Theory, and Ideology in the Coase Theorem', 52 *So Calif L Rev* 669 (1979).

more extensive experience with reasons of this kind. It is our view that outside monopoly regulation and a few other areas of the law, judges have seldom explicitly resorted to such reasons. For now, we hope to be asking some of the right questions and will be satisfied if our tentative answers either point in the right general directions or stimulate others to do better.

There is no jurisprudential literature that systematically treats the criteria for judging substantive reasons of any general type, let alone economists' reasons. Beyond introducing the notions that reasons should justify and be 'guidesome', legal theorists have devoted relatively little effort to articulating what we should expect of reasons. Perhaps our own gropings will induce others to address this topic as well.

1. *Does a Kaldor-superior reason have any justificatory force at all?*

Again, for a reason of substance to qualify as a reason, it must have justificatory force, and for it to have such force, a genuine value—either intrinsic or instrumental—must figure in it. In a mere Kaldor-superior reallocation it is true only that there are gainers, that there are losers, and that the gainers gain enough more than the losers lose so that the gainers *could compensate* the losers and still have a 'net gain' (as determined by willingness to pay for a right, or to pay to avoid a cost, stated in money). Again, economists do not generally require, for their reason to have justificatory force, that compensation actually be paid. To them, the important thing is the 'net gain', and this, of course, can occur without the gainer compensating the loser.

Now, a *court* might also order that the gainers *actually compensate* the losers with the intended result that gainers would still be better off yet *no one would be worse off.*[50] It is sometimes said that we would then have the equivalent of a Pareto-superior reallocation,[51] in which case we could simply return to our earlier analysis in Part II of the force of such a reason. Such court ordered compensation might be appropriate on *non-economic* grounds in any case in which the loser in effect lost what was plainly his prior right (as Downland would if the law had clearly given him a right to compensation). But observe that court ordered payment of compensation to the 'losers' might *not* be appropriate, on non-economic grounds as well. In the *Edgar* v *Betsy* case, the court was deciding between two property claimants to the same animal. When the issue is truly one of

50 In most cases there will be additional positive costs of transferring compensation and (sometimes) of enforcing such transfers. Thus, in the *Edgar* v *Betsy* case, the likely cost would probably be small (if Betsy has $150 of readily disposable cash)—she can simply write Edgar a check. But in the price fixing case, the cost of compensation (and of providing it in such a way that the primary [justifying] gains to consumers aren't nullified) may be enormous. So in general, we cannot say that for every Kaldor transfer ordered without compensation there is a corresponding transfer (in which compensation is required) that is Pareto-superior *and* achieves the same level of net gain overall.

51 See Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility', 49 *Econ J* 549 (1939) and I. Little, *A Critique of Welfare Economics* (1955).

title, then in the eyes of the law, whoever loses is not the owner and should receive nothing anyway. In the water run off case, we postulated a genuine case of first impression. The loser in such a case at least has much less of a claim to compensation.

We will now consider what, if any, justificatory force a Kaldor *reallocation* generates on its own terms (quite apart from its possible collapsibility into a Pareto reason via the 'compensation' route). Does a Kaldor reallocation *necessarily* generate a reason with justificatory force? For it to do so, at least the 'net gain' goal involved would have to be intrinsically good. That is, an intrinsic value would necessarily have to figure in this goal. Recall that in a Kaldor reallocation it is enough merely that there is a net gain determined by applying the willingness to pay criterion. Let us assume that the 'net gain' figuring in our goal takes the form of a *net increase in want realization.* We have already contended, in relation to Pareto-superior reasons, that this is not intrinsically valuable.[52] If we are correct, then this increase cannot qualify as a goal the realization of which as such generates a Kaldor reason with justificatory force.

But here there is a still further problem. The Kaldor analysis involves the willingness to pay criterion, and this criterion is applied without actually making 'interpersonal comparisons'. The price paid for this is that willingness to pay may well not track want realization. Tied as it is to ability to pay, willingness to pay simply cannot take account of interpersonal differences in the intensity of wants as such, yet these differences are relevant to whether a Kaldor reallocation truly involves a net increase in want realization. That is, on the willingness to pay criterion, the gainer (e.g., Betsy in our title to the animal dispute) could gain more as thus stated in money than the loser loses, yet there may be no true net gain in want realization (e.g., Edgar might want the animal far more but be without means to bid accordingly). Because of this factor, we cannot even assume that a Kaldor reallocation yields a net increase in want realization, even if that were an intrinsically good goal (which it is not).

Likewise, it is the tentative view of at least one of us that a particular Kaldor reallocation cannot be intrinsically good on the ground that it represents an autonomous exercise of free choice, or enlarges the scope for such choice.[53]

We conceded earlier that a *net increase in psychological satisfaction* is, however, intrinsically good and thus could serve as a 'net gain' goal that generates a reason with force.[54] Even so, a Kaldor reallocation—as determined by willingness to pay—does not necessarily bring a net increase in psychological satisfaction. We have already seen that willingness to pay does not invariably track net increases in want realization. *A fortiori,* the willingness to pay criterion cannot track net increases in psychological satisfaction. The criterion merely reveals each party's monetary valuations (in relation to their own resources). It is

52 See section II,3 of text 220–221 *supra.*

53 See further on autonomy, text accompanying n 26 *supra.*

54 See section II,3 of text 221–222 *supra.*

not and could not be a direct measure of satisfaction to each party.[55] Rather, the objects valued are mere means to future satisfaction. Parties do not buy satisfaction as such. Even if we could determine that a reallocation involved a net increase in *want realization,* it still would not follow that this would translate into a net increase in *psychological satisfaction.* People not uncommonly have their wants met and are thereafter disappointed or at least less satisfied than they expected to be.

Thus a specific projected Kaldor *reallocation* is not, on the foregoing grounds anyhow, *necessarily* justified—does not, merely as such, generate a reason with force. Nonetheless, a Kaldor reallocation does not have to be *necessarily* justified in itself in order to generate a reason. But to do so, a Kaldor reallocation must at least serve a genuine value—intrinsic or instrumental. What might this value be?[56] Of course, some of the candidates will overlap with those already considered in deciding whether a Kaldor reallocation is *ipso facto* justified. First, although we saw that a Kaldor reallocation does not always bring a net increase in psychological satisfaction, it may still do so in the circumstances. On our view, this would be a net gain that qualifies as an *intrinsically* good goal. Within a given problem area, however, the means-goal relations between Kaldor reallocations and net increases in psychological satisfaction are not only contingent but may even be highly variable. When so, they would generate a general reason of relatively little force, except when independent judicial investigation also confirmed sufficient efficacy of means for the case at hand (an inquiry that would commonly call for interpersonal comparisons).

On the other hand, the means-goal relations between Kaldor reallocations and net increases in psychological satisfaction might in some contexts lead to net increases in satisfactions with considerable frequency. In that event, a general

55 Note that any such direct measure would have to compare interpersonal satisfactions. Although it may in principle be possible to determine and net the number and intensity of satisfactions (unlike in the case of want realization), factual inquiries of this nature are extraordinarily difficult to make, and it is fairly certain that in many circumstances neither the data nor an appropriately non-arbitrary measure would be available.

56 It is logically possible that independent values of quite different kinds might be served by Kaldor reallocations. We are framing our discussion, however, as a search for values that might be thought of as more or less characteristically associated with such reallocations. But by 'characteristically' we do not envision either logical connection or perfect correlation.

This is not to say that quite different kinds of values cannot be realized in particular cases by such reallocations, but whether they are and what they will be, will turn on the quite specific facts of the specific cases. If the specific facts of the case indicate that a certain Kaldor reallocation would serve a valuable independent goal, this would favour the reallocation. More importantly, depending on what wants people happen to have, a Kaldor reallocation in a particular case might disserve the goal in question. In that case, we would have a reason (perhaps) to render a decision that precisely was *not* Kaldor efficient. What seems distinctive about Kaldor reasons is that a goal, increasing net social gains generally delimited by the willingness to pay criterion, is invariant across such reasons. If any goal that has a chance of being intrinsically prizeable characteristically, but perhaps not perfectly, tracks the invariant goal of maximizing 'social gains', it is increased satisfaction, happiness, contentment, etc.

reason with real force would arise, even without our knowing (through independent investigation) of a net increase in the particular case at hand. For example, if in a case of the *Edgar* v *Betsy* type, far more often than not an award of title to the highest hypothetical bidder would bring a net increase in psychological satisfaction, the argument would favour such awards, and *ceteris paribus,* the highest bidders should win. Indeed, even if independent judicial investigation in the particular case revealed that for the immediate persons affected there would be no net increase in psychological satisfaction, it would not follow that the putative Kaldor reason would have no force, for it might be that as a *rule* such persons would experience a net increase in satisfaction.

Second, is a Kaldor reallocation a means to an *instrumentally* good goal in the form of enlarged scope for autonomous free choice? This seems not only contingent but highly variable—perhaps so variable that we may be left merely with no general reason. Although the gainers might commonly end up with more free choice in the sense that they would have more resources with which to exercise and implement choice, the losers might commonly end up with what must correspondingly be denominated less free choice and this could regularly be fully offsetting in nature.

Third, are decisions in accord with reallocations that are Kaldor-superior a means to 'maximizing wealth'?[57] The instrumental 'value' or goal to be directly served here is that of maximizing the worth of resources affected by the decision, i.e., that of allocating those resources to parties who value them most. Under the willingness to pay criterion, those parties are the ones who would be willing to pay the most for them.[58] Two issues arise: (1) In what sense, if any, is there a larger pie? (2) What genuine value is served, either intrinsically or instrumentally, in having a bigger pie (in any sense)? Let us suppose that in the name of the gainers gaining more than the losers lose, the court in our dispute over title to the animal awards Betsy the animal (Betsy would pay $150; Edgar only $100), or the court in our price fixing case enjoins the price fixers (for the consumers would gain more), or the court imposes responsibility to take precautions on Downland (the cheaper

57 See Posner, 'Utilitarianism, Economics and Legal Theory', 8 *J Legal Stud* 103 (1978).

58 Note, however, that an economist's reason may be available (in certain circumstances) which supports a decision that is *not* the one among the available alternatives which maximizes resource worth the most. For example, suppose that there were three possible decisions, D1, D2, and D3, that a court could render in a particular case. Let the only affected resource be R. It might turn out that D1 maximizes the worth of R relative to D2 and D3, but that D2 maximizes the worth of R relative to D3, i.e., that D2 will result in a greater increase in the worth of R (or less of a diminution in the worth R) than would D3. Finally, suppose D1, the one of three which will increase the worth of R the most, must be rejected because of decisive reasons not derived from economics. D2 might be immune to such attacks. If so, it would still argue in favour of D2 over D3 that the former increased the worth of R more than did D3, i.e., if Kaldor reasons in fact have any independent and objective justificatory significance. Therefore, an economist's reason of this sort can be given to support a decision which does not maximize resource worth relative to all the other possible decisions. Thus, the general decisional criterion which mediates the relevance of Kaldor reasons to all possible decisions is best formulated as follows: *Ceteris paribus,* choose that decision that will increase the worth of affected resources *the most.*

cost avoider). Now in what sense, if any, is there a bigger pie? It might be thought that there is a bigger pie in the sense that the society's valuations of the resources affected goes up as a result of such court decisions. But this does not appear to be the case. Both before and after each court decision, the valuations by interested parties of the affected resources remain the same (other things being equal). Court decisions as such do not change these valuations (unless, of course, the court orders the resources destroyed or modified in some way). Of course, a court decision can put resources into the hands of those who value the resources most highly. But this is not to increase their value. It is merely to 'actualize' the higher valuation as between the parties.[59] Again, however, this is not necessarily good, and to the extent it turns out to be good it would appear that we have already canvassed the primary value of relevance: increased psychological satisfaction.

Is there a bigger pie in the sense that a Kaldor reallocation necessarily increases the total quantity of physical resources either in the particular case, or in the long run (pursuant to rules laid down in the particular case)? No. In our *Edgar* v *Betsy* example, there is not necessarily a physically larger pie (unless any saving in bargaining costs owing to court resolution is to be so regarded, and court costs must be charged against this). Indeed, this is plainly so if the circumstances leave the judge with no option but to award the animal merely to the highest bidder. Whether or not there is *de facto* a bigger pie depends on the facts of each case. And the predictability of any increase may vary greatly with the circumstances.

What values might any actual increase in the physical size of the pie serve? Again, as we have so far contended, there is nothing intrinsically good about having more goods of just any kind. For example, the increase in goods might consist of more alcoholic drink in the hands of our nine million alcoholics! Rather, it is best to say that more goods, or existing goods that will go farther, may be of instrumental value as means to enhanced psychological satisfaction generally. In the end, then, the value to be served through having a bigger pie would appear to be no different from the primary value we have already canvassed: psychological satisfaction.

Fourth, it might be argued on behalf of Kaldor reasons that decisions based thereon will foster social virtues such as productivity, diligence, honesty, altruism, and the like.[60] Of course, it is the *courts* who are acting in the first instance, not individuals, yet it is only through individuals acting in the social arena that human virtue may improve. We may also imagine decisions based on Kaldor reasons which do not foster these virtues. For example, resources may go to persons who do not *deserve* them. Willingness to pay does not track desert. And further, insofar

59 Prior to any transfer, the resource or right involved has its maximum worth, i.e., there is some amount more than which no one will pay to obtain the resource, for the value of the resource cannot be affected by transferring it or awarding it to anyone. Prior to any transfer, the resource already had its maximum worth, i.e., there is some amount more than which no one will pay to obtain it. The existence of this amount and thus of its maximal worth remains constant through any transfers, freely bargained or court ordered. See also an unpublished paper by Jules Coleman, 'Efficiency, Utility, and Wealth Maximization'.

60 See Posner, n 57 *supra*.

as any of the foregoing values, e.g., productivity, can be means to psychological satisfaction, this suggests once again that to economists the ultimate Kaldor rationale is increased psychological satisfaction.[61]

Finally, it may be said that decisions in accord with reallocations that are Kaldor-superior have the virtue of being decisions in accord with a manageable, uniform, and predictable decisional technique. But it is questionable how manageable this technique is, a topic to which we will return momentarily. Moreover, it is not at all clear how reliable and predictable the results of the technique would be. We may imagine, for example, that valuations would change with changes in the economy, and this might call for many settled results to be reopened. And it should be recalled that an economist's reason is only one of the possible types of reasons that may be relevant to a judge in a case. These other reasons will prove decisive in some cases and thus limit the claimed uniformity and predictability still more. Further, it has not been shown that alternative types of reasons grounded in such interpersonal considerations as equity and fairness between the parties or grounded in notions of public policy such as health, order, and safety are any the less reliable and predictable as bases for shaping one's conduct.[62] But even if the economist's technique were manageable, uniform, and predictable, this would leave much to be desired. Law must have substantive content, too, and, one hopes, good content. This is but another way of saying that *technique* must be *for* some goal or goals. Mere technique alone, no matter how manageable, uniform, and predictable, is of highly limited value within most realms of human interaction.

In sum, a reallocation that is Kaldor-superior does not necessarily generate a reason. Such a reallocation will, in conjunction with an independent value, be justificatory, however. The value most often at work will be a projected net increase in psychological satisfaction. The relative force of a reason in which such a value figures is another matter, as we will see.

2. *Sufficiency of justificatory force*

It is reasonable for common law judges to expect that the types of substantive reasons they are called upon to give will have force sufficient to justify at least some decisions more or less on their own. After all, the main point of substantive reasons is precisely that of justifying decisions (including choices of rules). The sufficiency of their force is important not only to judges and their immediate addresses in actual adjudicated cases. It is also important to other parties who are trying to decide whether to settle their disputes out of court. If the reasons judges give are themselves sufficient to justify actual court decisions at least in some significant proportion of cases, then it is likely such reasons will also influence at least some well-counselled disputants to settle out of court. In such instances, the force of the reason also facilitates dispute settlement.

61 Even if the virtues involved are intrinsically valuable, it is not clear that a Kaldor reallocation or pursuit of wealth maximization substantially promotes them or is the best way to promote them.

62 For discussion of these other reasons, see the article in n 1, *supra*.

It follows that a given type of reason of substance would be relatively insignificant as a justificatory resource if it usually served merely as a makeweight or tie breaker and was rarely strong enough to justify any particular decision solely on its own. Certainly the various types of reasons of substance now found in the common law cannot generally be characterized merely as makeweights or tie breakers. Consider, for example, the strikingly strong character of estoppel reasons in certain contract cases and of reasons in the name of public health or safety in certain tort and property cases.

We have already seen that Kaldor reasons are a subclass of 'goal reasons'—reasons of substance which derive whatever justificatory force they have from estimates that the effects of the decisions will serve good social goals. Before inquiring into the sources of the justificatory force of goal reasons in general and Kaldor reasons in particular, we will stop to explain why in our framework of analysis we classify Kaldor reasons as a subclass of what we call substantive goal reasons rather than as a type of reason that itself subsumes or swallows up all other substantive reason types, or at least all other goal reasons. It appears that some economists (and others) contend that a genuine Kaldor reason, properly construed, itself aggregates and nets out any and all relevant forms of value or goal realization.[63] We do not agree that this involves either an appropriate or a faithful conceptualization of non-Kaldor reasons, and because of this we classify a Kaldor reason merely as one among various subclasses of reasons of substance—as, indeed, only one of various subclasses of goal reasons.

We cannot undertake a detailed defence of our view here, however, and will only sketch briefly why we take the view we do. First, all relevant goal reasons in a given context do not collapse into a single all-encompassing Kaldor reason: The 'net gain' goal in a Kaldor reason typically is some form of psychic satisfaction or pleasure. This is simply not the inherent nature of the goals in non-Kaldor reasons. Health, safety, scientific truth, democratic process, etc., comprise possible subject matters of non-Kaldor goals. But in particular cases there may be essential differences between pursuing such goals and pursuing psychic satisfaction or pleasure. Clearly, health, safety, scientific progress, etc., are not simply identical to satisfaction, though in fact they often may be strongly correlated with it. But from this last fact it does not follow that the only basis for judicial resort to reasons in the name of non-Kaldor goals *must* in turn be pursuit of net increases in satisfaction. It is possible to pursue increased community health, for example, without pursuing an overall, long-term increase in community satisfaction. Thus, if a judge (or a legislator for that matter) wanted a population better fit for war, he might render decisions designed to produce a healthier population. He might pursue community health ultimately in the name of some form of Spencerian triumph of a particular social group or its cultural products, but quite independently of any commitment on his part to increasing the long-term satisfaction of the community. Indeed, achievement of such a goal might result in

63 Professors Kenneth Arrow and Frank Michelman have pointed this out to us. What we offer here addressed to this issue is necessarily abbreviated.

more pain overall! A judge simply can pursue non-Kaldor goals without pursuing net increases in psychological satisfaction *as such.* The most artistically or scientifically productive community, the most powerful or morally perceptive, the most noble, etc., need not be the happiest. The community which maximizes pleasurable experiences *tout court* is not necessarily the one that seeks to maximize only those pleasurable experiences which independently meet certain qualitative conditions. Further, many non-Kaldor goals can be rationally pursued for their own sakes. We do not see how one can easily argue (or much less just assume) that any goal a judge might rationally pursue must ultimately reduce to net long-term increases in overall psychological satisfaction.

Further, non-Kaldor reasons have a still wider form of independent significance. When judges give these as well as Kaldor reasons and the society acquiesces, this is one of the ways the society shows respect for a plurality of genuine values and therefore 'defines' itself as a society dedicated to health, pleasure, scientific progress, democratic forms, and so on.[64]

Now, what are the features of the strongest possible (or at least very strong) kind of goal reason as such? We may list the principal features as follows:

(1) The 'facts of the case'—who is in dispute with whom over what—are convincingly established beyond all doubt via reliable testimony or whatever other evidence is required.

(2) The judge has an unquestionably reliable basis for estimating likely goal serving effects of the decision, and the probability of such effects is itself highly certain.

(3) The estimated goal serving effects of decision in (2) are not *de minimus,* but, on the contrary, are quantitatively substantial.

(4) A very strong value (highly prizeable value) 'validates' (either intrinsically or instrumentally) the relevant social goal in (2) and (3).[65]

Now, are there grounds to believe that the usual Kaldor reason given to justify a decision in a typical common law case would not merely fail to measure up to the foregoing features but fall far below them, so that at least in many cases it could only be a makeweight or a tie breaker? Let us consider features (4), (3) and (2), in that order.

Perhaps the most difficult (and important) issue concerns the nature and strength of the value (or values) that is characteristically associated with Kaldor reasons. In general, we have seen that the principal value to be served through Kaldor reallocation is increased psychological satisfaction.[66]

The crucial question therefore is: *How* valuable or prizeable is increased

64 Of course in our view Kaldor reasons *a fortiori* do not swallow up 'rightness reasons', even if for some purpose we may 'factor' them into the calculus as at 232 of the text, *supra.* But we cannot go into this here.

65 We mean only two things by the words 'social goal': (1) that in general the goal is of a kind that may be pursued within the society on a broad social level and (2) that it is an appropriate goal for judges to try to serve, at least in some contexts. The general efficacy of court decisions as means of serving such goals is a complex matter we cannot go into here.

66 See section IV,1 text, 235–240 *supra.*

psychological satisfaction, at least in general? In some areas of the common law, the facilitation of private satisfaction occupies an important (though not exclusive) place. We here have in mind not only the generally consensual field of contracts, but also the law of wills, trusts, and gifts, and a significant portion of real property law. In other fields, such as torts, this is less clear. Of course, the 'psychological satisfaction' element of policies in such fields is hedged in by doctrines reflecting considerations of quite different types, e.g., equitable and other considerations expressed in rightness reasons and in legal norms based on such reasons.[67] Further, many goal reasons[68] often found in the common law invoke values that, as characterized in decisions, have a 'public regarding' flavour as opposed to a merely private want satisfaction flavour. The goals of increased safety and health are good examples. Of course, even with such goals, psychological satisfactions may constitute an important element in their valuableness, though not the only element.[69]

It is difficult to assess in a general way the relative overall strength of a class of reasons which ultimately target increased psychological satisfaction. Let us begin with the simplest case. Imagine that a lawyer for a party in a suit offers the judge the following reason for a decision in his client's favour: 'My client would derive a significant level of psychological satisfaction if he wins'. On the face of it, this seems like an extraordinarily weak reason indeed. It has little intuitive force. Further, it seems somehow inappropriate for a court to give very much weight (or even consideration) to such a reason. What explains the apparent weakness of this reason? There are several factors, but the most obvious is simply this: Only in a rare case would the very same reason be unavailable to the other party! It is no wonder that such a reason is virtually no help in determining which alternative decision is more justified.

Consider the next possibility: 'My client would derive a great deal more from a decision in his favour than would the opposing party from a decision in his favour'. This reason does seem slightly stronger than the first, perhaps because it obviates the limitation noted in connection with our first example. Even so, this reason seems intuitively, rather weak. Why? One obvious factor is that the language in which the reason is couched is, perhaps, relatively unfamiliar and technical. Let us rephrase it slightly: 'My client cares much more about (has a much greater psychological stake in) the subject matter of this lawsuit than does the opposing party'. That seems slightly better, but still relatively weak. What further factors might account for this? One that immediately comes to mind is this: The offered reason takes into account only the comparative levels of psychological satisfaction of the two parties before the court. It is just a fact that often court decisions and precedents affect more than just the immediate parties. But the reason is being offered in the name of satisfaction as such, and affected third parties are also capable of being satisfied or frustrated. Insofar as the court's

67 See n 1 *supra*, 735–51.
68 See n 1 *supra*, 752–53.
69 See text preceding n 64 *supra*.

decision is likely to affect many third parties, their wants must be factored in too. These parties include persons in the zone of immediate decisional effects and future similarly situated parties.

Consider, then, a third possibility: 'A decision for my client will significantly increase the aggregate level of satisfaction or happiness in the community'. Now this does seem to be a much stronger reason than the first two, and it is not too far-fetched to imagine the judge giving such a reason in his opinion (though perhaps in slightly different language, e.g., using phrases like 'public convenience' or 'community harmony').[70] With this third possibility, we have disposed of some of the factors that would weaken the force of satisfaction-based reasons viewed as an independent justificatory resource. However, such a reason may still not strike us as being particularly decisive in a given common law case. Why not? Perhaps it is partly because we know (even without consciously thinking of it) that reasons of other types—sometimes very powerful ones—might frequently support a contrary decision. For example, there may be countervailing goal reasons such that (i) the goals they involve would be disserved by increasing the aggregate level of community satisfaction, or (ii) the values to be realized by serving these alternative goals may not significantly depend on increasing the level of aggregate psychic satisfaction. A particular example would be the following: Many members of a society might prefer to own cars that go very fast and are otherwise of unsafe design (even though this involves some pain, too). Yet courts might hold manufacturers liable for damages for 'design defects' and thus lead manufacturers to build slower and otherwise safer cars, though at the cost of an overall decrease in levels of community satisfaction. Or again, increased satisfaction may be offset by countervailing rightness reasons having to do with the moral or equitable desert of the particular parties before the court or with the fact that increasing aggregate community want satisfaction may be unduly burdensome to (and so unfair to) some members of the community or one of the parties to the case. Many examples might be cited.

Of course, the fact that the goal of increased psychological satisfaction can be (and often is) overridden by other goal reasons and rightness reasons does not show that it is not a significant and valuable goal. For these same other goal reasons and rightness reasons can also be overridden in like fashion. Thus, sometimes fairness in the particular case must give way to concern for community well-being, e.g., in the name of more efficient production.

Now, turning to a further basic factor that figures in the degree of justificatory

70 It might be thought that a judge simply cannot give a reason with justificatory force without putting it in some such *general* form envisioned in the text. But this is false. If we don't know what the general (aggregate) effects will be, it is still *a* reason for decision that a contemplated decision will increase one persons's satisfaction. It might also be thought that a reason a judge gives must always be in the form of a reason in support of a *rule* for a class of cases. This, too, is false, even with respect to goal reasons, for a judge may sufficiently know likely goal-serving effects of a projected decision to justify so deciding in the particular case yet not be able to identify sufficiently well the combination of general goal serving factors required to formulate a general rule.

force of any goal reason, can it be said that the estimated goal serving effects of a Kaldor reallocation—increased psychological satisfaction—is likely to be quantitatively substantial rather than *de minimus?* We cannot see that a general answer is really possible. In many two party disputes which provide relatively little opportunity (on their particular facts) to structure incentives that will have wide application, a Kaldor reallocation might bring relatively little by way of a net increase in satisfaction. In other cases, as in our price fixing example, aimed at large scale commercial operations or widespread contractual practices, huge social gains might result from a single decision.

In regard to our remaining factor figuring in the justificatory force of goal reasons—predictability of decisional effects—this much can be safely said. Often the generalities and other forms of economic theory used to estimate likely goal serving effects will fail to generate reasonably certain estimates of allocative effects (including increases in net psychological satisfaction).[71] Indeed, many factors may operate even to make these estimates and projections highly speculative. Nonetheless, sometimes the overall decisional effects will be susceptible of accurate prediction.

In general, then, it is very difficult to assess the force of Kaldor reasons *as a class.* But this is also difficult to do with any class of substantive reasons the various members of which differ significantly in justificatory force. On this matter of essential elements of justificatory force, our tentative conclusions are these: specific Kaldor reasons may differ radically in justificatory force, perhaps far more

71 One issue that we want to raise briefly (but cannot treat here in any detail) concerns the character of the economic generalizations supporting the predictions often ingredient in an economist's reason. Some might object to calling such generalizations 'causal' or 'empirical'; rather, it might still be said that these generalizations are really either tautological or definitional. The plausibility of this claim seems to depend, in the first instance at least, on what one takes the content of the relevant economic generalizations to be. For example, one economic generalization—that if price fixing is removed then, without more, the worth of affected resources will be maximized—could be interpreted as asserting only what is generally or likely to be the case and would not necessarily be interpreted as containing implicitly all of the assumptions, definitions, and boundary conditions that it would have to contain under some relatively formal presentation of micro-economic theory and welfare economics in order for it to assert an unqualified generalization (in the logician's sense). On the other hand, when one states a corresponding generalization in which all such assumptions and definitions are made quite explicit, they do seem to become more like tautologies. This would appear to hold for our price-fixing generalization, especially if we built into it the assumptions that, e.g., all affected parties will be rational (in the game theoretic sense), that there will be no unforeseen transaction or information costs (i.e., that consumers will learn of the lower, competitive prices), etc. From an epistemological point of view, a switch to the more explicit and guarded formulation has its price, for with each new explicit assumption and condition, the less clear it is that the generalization in question actually applies to the particular case at hand (even though on its own, the guarded generalization may be more certain). From a practical point of view, it would probably be best for the judge to work with generalizations in which all relevant theoretical assumptions were explicit, for in this way he will be aware of precisely what he has to know about actual social conditions in order for his reason and its ingredient causal prediction to be sound.

so than rightness reasons, for example. Powerful reasons of other types (reasons involving different kinds of values) are almost always available in decisional contexts and must not be ignored. But for now it appears that economists' reasons of the Kaldor variety may represent a significant justificatory resource in a fair number of cases. Our limited optimism is premised on
(i) the degree of strength of the general utilitarian principle that *ceteris paribus* human wants ought to be satisfied, and
(ii) the view that sufficiently convincing arguments can be developed to show that Kaldor reallocations (wherein the willingness to pay criterion determines gain and loss) are effective means to significant increases in satisfaction.

3. *Extent to which countervailing reasons are readily available*

The overall justificatory significance of a general type of reason is affected by the degree to which strongly countervailing reasons concomitantly arise. Thus, even if a relatively strong type of reason ordinarily arises from a given set of justificatory resources, the general justificatory significance of this type of reason is diminished if strongly countervailing reasons concomitantly arise with it. We are not in a position to estimate the frequency of any concomitant countervailing reasons. We will, however, explore in a tentative way the *scope* for such reasons. That scope is considerable. Both countervailing rightness reasons[72] and other subclasses of countervailing goal reasons[73] may regularly arise.

A net gain in psychological satisfaction—the primary value in a Kaldor reason—may in a particular case even be accompanied by the realization of evil or otherwise bad wants. Indeed, the *gainer's* realization of these very wants may even be what it is that actually gives rise to the net increase in psychological satisfaction! As one theorist has put it, the wants of the gainers in a Kaldor reallocation may be 'mercurial, greedy, bigoted, lustful, etc.'[74] (Betsy, for example, may outbid Edgar merely for spite.) Of course this does not diminish the net increase in psychological satisfaction derived from the realization of such wants. The economist's reason as such is left intact. But any morally bad wants thus realized generate countervailing rightness reasons that judges may also quite properly take into account. And these rightness reasons may well override the economist's reason.

At the same time, the want realization that figures in a net increase in psychological satisfaction generating an economist's reason may readily conflict with a social goal such as safety, conservation, health, or the like. The countervailing goal reason that thus arises may also have overriding force.

Now, let us assume that the gainers' wants are not contrary to moral norms and do not conflict with social goals, and thus that no countervailing reason arises from these sources. It might still be that the *losses* of the *losers* in a Kaldor reallocation are not merely personal to the losers but of special social significance.

72 See n 1 *supra*, 735–51.
73 See n 1 *supra*, 752–73.
74 Schwartz, 'On the Utility of MacKay's Comparisons', 72 *J of Phil* 549 (1975).

The losers, for example, may be engaged in socially meritorious activities—research, dissemination of information to the public, private charity, etc.—such that after the reallocation these activities would have to cease or diminish. In these circumstances, countervailing goal reasons (in the name of these very meritorious activities) would arise that might well, *if* combined with the losses to the losers as such, override the gains to the gainers, overall.

At the same time, the losses of the losers in a Kaldor reallocation might also be contrary to applicable rightness norms. Thus they might fly in the face of norms of desert or justified reliance or the like—norms that generate countervailing rightness reasons that alone or together with the psychological losses to the losers and any countervailing goal reasons easily override psychological gains to the gainers (or even such gains combined with the force of any other reasons that parallel these gains).

Even if no countervailing reasons arise in opposition to the gains of gainers (as above), and even if the losses of the losers are not exacerbated by concomitant disservice of goals or by disregard of rightness norms (as above), the reallocation on which the economist's reason rests might still contribute to an existing maldistribution of income. The losers might turn out even with regularity to be poor so that, in effect, the gainers would really be gaining literally at the expense of the poor. Again, this would not diminish the economist's reason as such, but it would give rise to a countervailing reason that judges could be expected to consider.

4. *Commensurability with other reasons*

In most common law cases not one but several possible reasons for decision come into play. As we have stressed, frequently these reasons will not all be of the same basic type. Some may be other varieties of 'goal reasons' in the name of such values as public health and safety (as in some nuisance cases) or family harmony (as in some intrafamily tort cases). Others may be 'rightness reasons' in the name of norms of right conduct incorporating such values as desert, fairness, dignity, autonomy, and the like.

The common law is filled with goal reasons and rightness reasons. Judges must often resolve conflicts between different goal reasons, different rightness reasons, and different goal and rightness reasons. Judges have accumulated considerable experience weighing such reasons against each other. And, although judges have not always done this well, this does not appear to be because reasons of these types have proven to be insufficiently 'commensurable'. Is the same likely to be true of Kaldor reasons? In our view, most common law judges have had little experience weighing such reasons against each other, against other goal reasons, and against rightness reasons. But even with experience, it may be that judges would have special difficulty determining the force of, and therefore *weighing*, Kaldor reasons against reasons of these other types. We think this *may* be so partly because there are grounds to believe that such reasons are rather more speculative than many goal reasons. Kaldor reasons call for prediction of cause-

effect sequences and for estimates of total resource allocation impact with special reference to changing market conditions. Also such reasons turn on 'appetitive' concepts and experiences the measurement of which in some particular cases seems especially problematic.

To the extent judges find it difficult to cope with the weightings of Kaldor reasons, any of several untoward consequences might ensue. Except where the reasons are quite obviously strong, the judges might simply treat them as makeweights or tie breakers. We have already suggested that if this is all there is to such reasons, then they cannot qualify as a major justificatory resource (at least outside monopoly regulation and like areas). Or the judges might also end up giving such reasons far more than their due. That is, reasons of this kind might become 'over decisive'. Indeed, it appears that if some proponents of economic analysis in the law were to have their way, Kaldor reasons might get more than their due against competing reasons of other basic types.[75]

5. *Intelligibility and persuasiveness*

Ideally, the reasons judges give should be intelligible and persuasive to the governed. In particular, they should be explainable to losers. If it is too much to expect most losers to be persuaded, it remains important for the reasons to be intelligible to them.

It is therefore not enough for a case to be in fact decided as it should be decided, in light of the true force of all relevant reasons. It should also be possible for the interested public—the bench, the bar, the parties, and related third parties—to see for themselves that the case has been so decided, or at least decided on intelligible grounds. Intelligibility and persuasiveness help make the final decision more acceptable to the parties, thereby reducing the need in the particular case for coercive enforcement (with attendant friction, waste, and loss of liberty). These features also generally render the law more respectworthy and consequently capable of motivating higher levels of conformity. They also render the law more readily appraisable by the public and thus susceptible of rational revision as conditions and values change. And, as we will see, they make the law more guidesome.

This requirement of intelligibility and persuasiveness differs from the requirement that a type of reason be sufficiently justificatory. The justificatory force of a proferred reason is not identical with its intelligibility or its persuasion potential. A type of reason can have sufficient justificatory force yet not be particularly intelligible or persuasive.

In terms of general intelligibility and persuasiveness, how do Kaldor-superior reasons fare? The answer appears to depend on the particular instance of the reason under consideration. It is possible for a particular reallocation to be Kaldor-superior and to generate a net increase in satisfaction yet the intelligibility and persuasiveness of the specific reason thereby arising be quite limited. Complex

75 See, e.g., R. Posner, *The Economic Analysis of Law* (2nd ed 1977).

economic analysis, including, for example, sophisticated price theory, might have to be brought into play to determine that the reallocation and its effects are truly Kaldor-superior.

Of course, not all instances of the reason will involve complexity beyond the laity. But even when relatively simple economic analysis is required in the construction and formulation of a reason, it may be that relatively few lay persons or even professionals will be able to grasp the reason. (No doubt this helps explain why judges in relatively few common law cases have explicitly resorted to this kind of reason.)

But we must be wary of rejecting economists' reasons on the ground that economic analysis is neither intelligible nor persuasive to the law's various audiences, as matters now stand. For one thing, this would be to cast doubt on any goal reasons in the name of values other than psychological satisfaction but in which economic analysis somehow figures. Indeed, by implication it would be to cast doubt on any reason in which some technical form of analysis is at work. Reasons involving mathematics, the laws of physics, biology, etc., would be in some jeopardy. Furthermore, it might be well that more of the citizenry, the judiciary, and the legal profession should study economics!

At the same time, if the general class of Kaldor reasons would in fact be relatively unintelligible and unpersuasive to the law's audiences in common law cases, this feature would involve costs that would have to be counted.

6. *Transmutability into stable rule*

Reasons of substance are the raw material of rules and related legal norms. At least minimal generality is implicit or explicit in a reason—if essentially the same circumstances recur, then the same reason arises. Of course common law courts, treatise writers, 'restaters', and others go beyond this, and undertake to transmute reasons into explicitly formulated rules and other norms. (Of course, such rules need not be—and are not—absolute and unqualified.)

Why are stable rules and other general legal norms as such important? It is familiar to lawyers that rules serve as vehicles for carrying substantively sound results forward beyond the particular case, secure a measure of equality before the law, and provide predictability with respect to likely official action so that private parties can know their legal positions and thus plan and also decide when and how to settle private disputes.[76] And, as we have seen, there may even be *special* economic gains from rules.[77]

Thus, if economists' reasons should prove inadequate as raw material for the creation of rules, this would ordinarily be a serious deficiency. (It would not, however, follow that economic analysis would be of no use whatsoever to lawyers.) Experience teaches us that the ordinary goal reasons and rightness reasons found in the common law are generally adequate rule 'generators'. What

76 For a more extended effort to canvass the 'legal' value of rules, see Summers, *Working Conceptions of the Law* (in press).

77 See discussion of *Jean* v *Foto*, text *supra* 227–229.

of Kaldor reasons? Such reasons can and do generate rules, as we saw earlier.[78] But one possible ground for scepticism may be noted. Rules originally based on Kaldor reasons would be based in part on such factors as then current market prices, costs of avoidance, etc. It follows that such rules would be subject to change as these factors change. It seems likely that rules so based might even be far more changeable than typical rules we now have in the common law generally. To the extent this is so, many of the values of having rules in the first place would be less well served.

7. *'Guidesomeness'*

Rules and other common law norms are not self-defining. They must be interpreted and applied to concrete particulars. If judges interpret and apply rules mechanically solely in the light of the apparent literal meaning of the words in the rules, then the rules will 'overinclude' or 'underinclude' or both. Many legal theorists have stressed that legal rules and other norms should therefore not be interpreted and applied literally or mechanically but in light of the reasons behind these rules and other norms. To facilitate this 'rationale oriented' mode of interpretation and application, some theorists have advocated that legal rules and other norms be formulated either with their reasons stated 'on their faces' or at least otherwise suitably appended.[79] For example, let us suppose that the stated rationale for a rule requiring that a contract modification be in writing is simply evidentiary, there being scepticism about the reliability of mere oral testimony. If, however, a given seller had actually started to manufacture goods before the buyer repudiated an oral agreement modifying the specifications, *this conduct* should satisfy the evidentiary rationale, too, for it would be corroborative and the court would not have to rely on mere oral testimony.

The foregoing rationale-oriented mode of interpretation and application can be readily defended. Assuming that the rule or other norm is well conceived in the first place, then if and only if it is interpreted and applied in accord with the reasons behind it can the rule or norm satisfactorily serve its ends.

Again, experience tells us that the goal reasons and rightness reasons that judges have traditionally brought to bear in common law cases are appropriately 'guidesome', at least when adequately formulated. What of Kaldor reasons? We have seen that these take the following summary form: 'Decide in favour of alternative X because on that alternative the gainers gain more than the losers lose'.

Can a reason of this general kind sufficiently guide the interpretation and application of any rules into which it transmutes? If we are correct, the law has not yet had sufficient experience with enough Kaldor rules or Kaldor reasons over a wide range of common law contexts to be able to answer this question.

78 See discussion of *Edgar* v *Betsy* and of *Jean* v *Foto*, text *supra* 225–229.

79 '[T]he most desirable kind of rule . . . is a rule which wears both a right situation reason and a clear scope criterion on its face'. K. N. Llewellyn, 'Grand Style and Formal Style Rules', in W. Twining, *Karl Llewellyn and the Realist Movement*, 495 (1973).

Of course, it may be that the Kaldor analysis generates few stable rules, anyway, besides the rule: 'Always apply the Kaldor analysis'. If that should turn out to be so, the analysis could not survive the requirement, treated in the preceding section, of sufficient transmutability into rules. Moreover, an important parallel issue arises in any event, and we now turn to it.

8. *Efficient constructability*

If a type of reason is not, in the typical circumstances of its possible availability, efficiently constructable, then it follows that resort to it is not generally worthy of the time and effort required. Again, in our view we do not yet have much experience with explicit judicial construction of economists' reasons in common law cases. Even so, there is some basis for believing that a reason of this nature may prove to be less than efficiently constructable even in the mine-run of cases. We will now explore some of the more obvious difficulties.

First, the judge will often encounter problems in determining whether a projected reallocation is Kaldor-superior. He must cope with indeterminacies in the very methodology itself. For example, in a case like *Edgar* v *Betsy,* what allowances is he to make for the possible influence of ignorance upon the statements of willingness to pay on the part of the parties? And what is to count as the 'base position' of each party? That is, is each party to be considered a total non-owner or is each to be credited with a valuable chance to become owner? Then how certain do reallocative effects have to be before we are to count them as part of a projected reallocation? Plainly judgment is called for here.

Beyond indeterminacies in the methodology, the judge must gather data and apply economic analysis to it if he is to determine whether a reallocation is superior. Several kinds of serious difficulties may arise all in the same case. And one of these, at least, is sure to arise in almost every case. Sometimes it will be hard to get reliable data. For example, parties (e.g., Edgar and Betsy) are sure to overstate their valuations once they understand that ultimately neither need actually pay anything. It is only a partial answer to say that evidence of their own prior preferences and of related market prices may be used to impeach their credibility and discipline their testimony.

Sometimes sophisticated economic analysis will be called for. Thus, for example, in the price fixing type of case it might be appropriate to bring complex branches of price theory into play. Still other issues of cause and effect will arise, and the bearing of causal generalities in economics may be quite uncertain.

Sometimes there will be insoluble problems of valuation. For example, let us return to the used car dealer example and assume that the churches do object to Sunday sales so that we have losers as well as gainers. How would a price tag—willingness to pay—be placed on the churches' valuations of the right? Here we are at many removes from market analogies, yet surely no court would be content to rest merely with what the churches say their valuations are.

Second, for the putative reason to have justificatory force, the judge must satisfy himself that the reallocation he has found to be Kaldor-superior fulfills an

independent value. Here the judge may choose either of two routes. If he rests content solely with the results of applying the willingness to pay criterion, he may, as we have already seen, encounter difficulties in getting reliable evidence of willingness to pay for a resource or to avoid a cost attendant upon not having a resource. But beyond this, and more important, we have also seen that a calculation of net gain based on the willingness to pay criterion is no guarantee of a net increase in psychological satisfaction, the value characteristically associated with Kaldor reasons. If the judges choose to rest content with this, it may be that no independent value will figure in the reason so far as the particular case is concerned. In that event, the judge would have to be prepared to live with a reason having force only because of presumed value realization (net increases) in the mine-run of future similar cases falling under the rule implicit in the decision. (Of course, this state of affairs sometimes obtains with respect to non-Kaldor goal reasons, too.)

On the other hand, if the judge is unwilling to live with a reason that would have force in the case at hand only because of its bearing in future cases, he must engage in interpersonal comparisons of likely psychological satisfaction in the case at hand in order to determine whether in that case there is a net increase in satisfaction in the offing. Economists themselves frequently proclaim that such comparisons are impossible or at least highly difficult on grounds we will illustrate from the case of *Edgar* v *Betsy*. The issue of any net increase is a factual one. Just because Betsy is willing to pay $150 and Edgar only $100, it does not follow that to award the animal to Betsy would increase net satisfaction. A dollar to Edgar might be worth twice as much as a dollar is worth to Betsy, who is rich. But to determine whether the marginal utility of money to Betsy is much lower than to Edgar would be factually very difficult, for the judge would need to investigate the preference orderings and the psychologies of satisfaction of each party and compare them. To put this another way, the intensity of Edgar's preference for the animal might exceed that of Betsy, yet Betsy might still bid more for it. If Edgar's preference is that intense, his dissatisfaction in not getting it would offset Betsy's satisfactions, and there would be no net gain. One reason it would be very difficult to determine this is that we have no direct or wholly adequate way to measure and compare the magnitudes of preference intensities of different persons.

Whether the foregoing possibilities really do signal relative or excessive 'unconstructability' is not clear to us. We do note that such reasons have heretofore played a role in the law mainly in monopoly and related fields of *economic* regulation. Moreover, it may be that there are special explanations for the seeming ready availability (and immediate intuitive appeal) of the reasons in those areas. The issue in many of those cases is whether there will be some *fairly large increment* of gain over loss from judicial intervention in the name of removing *market distortions*. Relatedly, the economic analysis of likely effects can proceed in rather more gross or global terms for the segment of the economy involved in the case. This means that close interpersonal comparisons of gains and losses is not required as in a two party tort, property, or contract case. In addition,

it may be that we can take it for granted that any sizeable increase in net satisfaction in the offing in such cases will not involve an undue proportion of wants that are objectionable in a suitably strong sense.

9. *Possible arbitrariness of boundary conditions*

At least all 'goal reasons' presuppose some 'boundary conditions'. That is, the judge cannot be expected to devote endless energy in each case trying to ascertain all possible future effects of his decision on all possible parties and third parties. But if an analytical scheme for the generation of a reason for decision arbitrarily restricts the range of inquiry relevant to the force of the reason, the force of that reason in the particular case may be problematic. An arbitrary restriction may function either to overstate or to understate the force of the reason. In a Kaldor reason, the restriction would overstate force in any case in which it foreclosed inquiry that would show losses not otherwise registered in the calculus, and would understate force in any case in which it foreclosed inquiry into gains not otherwise registered in the calculus.

Can it be said that the boundary conditions imposed on Kaldor analysis of gains and losses from a reallocation are arbitrary? This question is difficult to answer. As yet no settled or authoritative specifications of those conditions is to be found in the literature. Nor is there an accepted test of arbitrariness. But this much should be clear. Any boundary conditions that confined the gains and losses to be counted merely to those sustained by the immediate parties and future similarly situated parties would be arbitrary. A judicial reallocation would be almost certain to affect still others (who would then be either gainers or losers).

A judge might decide to abandon the willingness to pay criterion and approach the issue of any projected net increase in satisfaction directly. In that event, we might formulate a test of arbitrariness along these lines. The force of a reason increases as its range (in terms of effects radiating from the decision) and its temporal span (into the future along whatever relevant chain of causal effects) increase. Just so its justificatory force decreases (though not necessarily to the same extent) with any additional uncertainty that attends the judge's predictions because of increases in their range or temporal span. And although there is no clear or mechanical way to determine this, in an ideal case the judge would increase the range and span of his predictions just up to the point where increases in uncertainty (or in other costs of acquiring the relevant information) would marginally offset increases in the justificatory force of the reason due to more far ranging predictions. A boundary on the range and span of ingredient predictions that clearly falls short of such an ideal end point would be to that degree arbitrary.

10. *General 'range' of reason*

It of course counts against the justificatory significance of a type of reason if its range of applicability is quite limited or 'pocketed'.

First, there is what might be called 'conceptual unavailability'. All goal reasons are inherently future regarding. Thus the justificatory scope of Kaldor reasons

does not extend to decisions confined largely to the imposition of liability for past losses or harms, i.e., 'sunk costs'.[80] Yet, in a significant proportion of common law cases, the primary issue is not how the future may be fruitfully structured, but only what if anything a court should do about a past 'mess'.

Second, we may also consider the potential range of Kaldor reasons in relation to the main general types of common law cases. There is the 'particularizing' type of case in which the task of the judge is not to justify a change or to justify the status quo but merely to particularize authoritatively what that legal status quo is. Here, the Kaldor analysis is irrelevant, for no possible 'move' is projected.[81] Then there is the 'overruling' (or 'modifying') type of case where the judge considers whether to move away from the existing legal state of affairs and substitute a new one. Here there is, of course, full scope for the Kaldor analysis, subject of course to the various practical limits on the constructability of Kaldor reasons. (Indeed, it may be that Kaldor reasons are *too* powerful—that they would too readily authorize overrulings and thus leave existing rights too much at risk.)

Further, there are full fledged cases of first impression where, for example, the court is asked to award title in novel circumstances, as in our *Edgar* v *Betsy* case. Here we are projecting alternative legal states of affairs—say, title in one type of claimant or title in another type of claimant. We saw that practical limits and also an important theoretical one may come into play in perhaps a significant proportion of cases. The so-called 'willingness to pay' measure depends on ability to pay, and ability to pay depends on what rights one has, yet in the very nature of the problem, those rights are not specified. At least whenever having the very right in question might affect one's ability to pay and thus one's willingness to pay, the answer to the question: 'How much would that person be willing to pay for the right?' may vary depending on whether it is assumed that the party has or has not the right already. As a result, the calculation of gains and losses may be affected, and the decision be one way, or the other, accordingly. Obviously, a purported justificatory rationale that decides one way and then the other, in the same case, cannot be very helpful to the judge.[82]

11. *Suitability for court use*

Some reasons are not suited for court use. For example, courts ought not to base decisions on straightforwardly 'political' reasons. On the other hand, a legislature may rest with such reasons. It might be argued that the question whether one type of person or group should gain at the expense of another type of person or group mainly in *terms of enhanced psychological satisfaction* (as in a Kaldor reallocation) is essentially a political matter, especially given (i) that decisions based on reasoning to the effect that the gainers gain more than the losers lose may

80 See, e.g., R. Posner, *The Economic Analysis of Law* 18 (2nd ed 1977) and remark in parenthetical text accompanying n 38 *supra.*

81 Of course, Kaldor may already be 'built in'. Compare n 29 *supra.*

82 See text 233–234 *supra.*

systematically favour the wealthy because calculations of gains and losses are done in terms of the willingness to pay criterion, a criterion tied to ability to pay, and (ii) that judges have little or no control over the nature and size of any 'compensatory' or other transfer payments that the government may make to the less well off.

The limits of institutional competence may also affect the kinds of reasons a court may properly give. As we have seen, Kaldor reasons sometimes call for complex factual inquiries that may be beyond the fact finding machinery of courts. American experience to date with much antitrust litigation is not a basis for optimism.

V. CONCLUSION

Genuine Pareto-superior reasons will seldom be available to common law judges, mainly because in the usual lawsuit there will be a loser or losers. Kaldor-superior reasons will at least be theoretically available more often, but it seems that they will frequently not be efficiently constructible in particular cases. Moreover, the justificatory force of Kaldor reasons is likely to vary greatly, depending on (among other things) the strength of the connections between the reallocations and the independent values involved (increased satisfaction and the like). Even when this force is considerable, the force of competing goal reasons or rightness reasons (or both) may often override.

In our view, it is still too early to know whether Kaldor reasons have a legitimate future as a *general* justificatory resource. Of course, we may never know this, for judges may decline to experiment with the required explicit resort to such reasons across the common law. In that event, several issues relevant to assessing these reasons would have to be left as we have left them here—largely unresolved. It is certain that any judicial experimentation with Kaldor reasoning that does occur (outside traditional fields) will be the object of keen academic interest. And actual instances of a relatively new and allegedly wide ranging type of substantive reason merit the closest scrutiny, for substantive reasons have primacy within the common law.[83]

83 Finally, we are painfully aware that we have not been able to treat in any kind of detail a number of important issues in value theory. These include the basic questions of whether voluntary choice or psychological satisfaction is intrinsically good and of what it is ultimately for a reason to be objectively sound or have genuine justificatory force. Here, we have only been able to identify those points at which economic analysis in the common law makes contact with value theory proper and to indicate what our intuitions on these issues are.