BOOK REVIEW

The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's *The Economics of Justice*

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I. TWO FORMS OF NORMATIVE ECONOMICS

The economic analysis of law has taken a decidedly normative turn, especially in the hands of its legally trained advocates. Two forms of normative economic analysis have emerged. One form advocates deploying the principles of neo-classical microeconomic theory to evaluate, and where necessary repair, existing legal and political institutions and policies. This mode of analysis assumes that it is appropriate and desirable for courts, legislatures, and other policy-making bodies to pursue economic efficiency. If the rules these institutions fashion are "efficient," that counts strongly in their favor; if not, they are to be replaced by efficient ones.

Recently, the leading proponent of normative economic analysis, Richard Posner, has written a series of articles considering the moral foundations of economic analysis itself. Posner's work is at the forefront of the second form of normative economic analysis, a form of inquiry that turns the mirror of analysis inward. Instead of asking whether a legal rule is efficient, Posner tries to answer the more fundamental question of why the law or public policy should promote efficiency: What, if anything, justifies efficiency?

Posner's essays on the foundations of normative economic analysis, along with a number of his other essays on normative economics,

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* I would like to thank Mark Kaplan for his help on the question of whether individuals making a social choice would opt to maximize wealth via applications of the Kaldor-Hicks criterion.

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The book is a collection of fourteen essays, organized around four basic themes: (1) Justice and Efficiency; (2) The Origins of Justice; (3) Privacy and Related Interests; and (4) The Supreme Court and Discrimination. The essays blend together well enough to be read as a treatise on the relationship between economic efficiency and social justice. Yet the units are self-contained and can profitably be read separately. The book is a testimony to the range of Posner's competence and interest. It is nicely written and accessible to anyone familiar with the particular legal issues he discusses, with the general problem of justice, or with tools of economic analysis.

In this review, I want to focus on Posner's section on Justice and Efficiency. In these chapters he attempts to ground the pursuit of economic analysis within a defensible normative framework. This pursuit, it seems to me, is the most interesting work currently on the agenda in the economic analysis of law. The problem, I fear, is more interesting than the solution Judge Posner provides.

Posner distinguishes between utilitarian and wealth maximization conceptions of efficiency and argues on behalf of the latter. Whatever form the pursuit of efficiency takes, however, arguments on its behalf can be of two sorts: teleological arguments or arguments from consent. Posner seeks to justify wealth maximization on both sorts of grounds. I will argue that neither of Posner's arguments, nor any other plausible available arguments, justify pursuing certain versions of efficiency, in particular those based on the Kaldor-Hicks criterion. Part II develops in more detail the problem of justifying efficiency. Part III rebuts teleological arguments; Part IV rebuts arguments from consent.

II. THE NEED TO JUSTIFY KALDOR-HICKS

A. Three Efficiency Criteria

Let's begin with the standard definitions of three efficiency-related notions: Pareto superiority, Pareto optimality, and Kaldor-Hicks efficiency. All three involve the ranking of states of affairs.

2. Earlier versions of the essays which make up the book's section on Justice and Efficiency originally appeared as Blackstone and Bentham, 19 J.L. & ECON. 569 (1976); Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103 (1979); ECONOMIC ANALYSIS OF LAW 189-91 (2d ed. 1977); The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 HOFSTRA L. REV. 487 (1980); The Value of Wealth: A Comment on Dworkin and Kronman, 9 J. LEGAL STUD. 243 (1980).
One state of affairs, $T$, is Pareto superior to another state, $S$, if and only if going from $S$ to $T$ makes no individual worse off and makes at least one person better off—as judged by each individual's conception of his own welfare. In other words, $T$ is Pareto superior to $S$ if no one prefers $S$ to $T$ and at least one person prefers $T$ to $S$. A state of affairs is Pareto optimal if no other states are Pareto superior to it, i.e., any departure from it will make at least one individual worse off.

If states of affairs could be ranked by the Pareto standards only, most, if not all, changes that take place in the real world could not be compared. Most real world policies produce winners as well as losers and the Pareto criteria cannot help us evaluate them.

The notion of Kaldor-Hicks efficiency was introduced to resolve this problem. One state of affairs, $T$, is Kaldor-Hicks efficient to another state, $S$, if after going from $S$ to $T$ the winners could have compensated the losers. By comparison, since Pareto superiority requires that moving from one social state to another produces no losers, satisfying the criterion requires that gainers actually compensate losers. Because Kaldor-Hicks efficiency enables us to compare states of affairs that involve losers as well as winners, it extends the Pareto rankings.

B. Two Points of Interest in Coase

Most work in normative economic analysis takes its cue from Ronald Coase's seminal piece, The Problem of Social Cost. Coase showed that, assuming rational, cooperative behavior, no transactions costs, and no wealth effects, the assignment of legal rights between competing resource users will not affect the efficient distribution of resources. As between two competitors vying for a land use, the land will be put to efficient use no matter who initially holds the property right. If the person who values the use the least is initially assigned it, he will sell it to the party who values it more; and if the party who values it more is initially assigned the right, he will refuse any trade since the other individual will not offer him sufficient compensation. In the end, the individual who values it most secures the entitlement. That outcome is Pareto optimal since the only way to make one party better off—shifting the entitlement to him—makes the party who loses the entitlement worse off. Moreover, the optimal outcome is secured either straightaway or through mu-

tual gains via trade, that is, through Pareto superior exchanges. The Coase argument relies on the efficiency notions of Pareto optimality and superiority. This is the first feature of the argument of interest to us.

In the Coasian world of costless transactions, free exchange produces welfare maximizing outcomes. By freely exchanging with one another, rational, self-interested individuals promote their private welfare and, in the absence of adverse third-party effects, the collective welfare as well. In the Coasian world, then, we find a merging of libertarian and utilitarian political moralities. The libertarian’s emphasis on free exchange and the utilitarian’s concern for welfare maximization are both exemplified by Pareto superior moves to Pareto optimal outcomes. The political dualism of economic analysis—the question whether its normative underpinnings are in free market libertarianism or classical utilitarianism—is the second feature of interest in Coase’s argument.

C. Posner’s Use of Coase

Coase was concerned with how legal rights affect efficient resource use when transactions are costless. Posner is concerned with how rights should be assigned when transaction costs make it impossible to secure optimal outcomes through free exchange.\(^5\) He argues that where the assignment of legal rights affects resource distribution, the law should “mimic” the market: That is, rights should be assigned to produce the result the costless market would have produced. Posner’s approach departs from Coase’s strategy in two significant ways. First, unlike Coase’s argument, it does not involve the ideal of Pareto superior moves to Pareto optimal outcomes. Second, it reveals the underlying tension between the utilitarian and libertarian normative bases for economic analysis, and can in fact rest on neither.

1. Posner’s reliance on Kaldor-Hicks efficiency.

The difference between law as market mimicker and the market is that in the costless market the efficient outcome would have been secured through trades involving mutual gain. In Posner’s world, the only possible move is switching a legal right from one party to another. His prescription—assigning the right to the party who would have ended up with it in the Coasian world—usually makes the other

party worse off. For example, if the law assigns to a manufacturer the right to pollute the environment of surrounding neighbors, then those neighbors are worse off. Because the manufacturer would have purchased the right to pollute from its neighbors had they been entitled to prohibit its pollution, it could, absent transaction costs, compensate them if it had to. But by assigning the right directly to it, the law frees the manufacturer of the obligation to do so. The result may be an optimal use of resources, but it is not achieved through a mutually beneficial transaction or even through a mutually satisfactory forced exchange.

Coase's strategy relies on Pareto superior moves to Pareto optimal outcomes. Altering legal rights without requiring compensation makes some individuals worse off. Thus, Posner's rule fails to satisfy the Pareto superiority criterion. However, assigning the right to the party who would have purchased it in a costless exchange market guarantees that the individual who secures the entitlement could have compensated the losers and still have been better off. Thus, Posner's rule satisfies the Kaldor-Hicks criterion. At best, then, Posner's principle for assigning rights produces Pareto optimal outcomes via Kaldor-Hicks moves. It is very unlikely, moreover, that assigning rights in conformity with the Kaldor-Hicks criterion produces Pareto optimal outcomes. Posner himself recognizes this since he believes that one purpose of market intervention is to reduce transactions costs to facilitate further trades. Assignments that permit additional mutual gain cannot be Pareto optimal since a Pareto optimal state has no states Pareto superior to it. Following Posner amounts to endorsing the principle that legal rights should be assigned according to the Kaldor-Hicks criterion. In this respect, he differs from Coase who relied primarily on the Pareto superiority and optimality criteria.

6. See generally N. GOODMAN, FACT, FICTION, AND FORECAST (3d ed. 1973). In text, I assume that mimicking the market is feasible. But mimicking the market requires gathering information about which trades individuals would have bargained for in a costless market. Judgments about behavior under such conditions are counterfactual conditionals: i.e., \( X \) would have done \( Z \) if \( Y \) had obtained, but \( Y \) did not obtain. Determining the truth value of counterfactual conditionals is notoriously difficult, especially under standard economic theory which counts as evidence of an individual's preferences only those trades he or she makes in actual markets. See generally P. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS (1963). Standard theory appears to preclude gathering the information necessary to insure that Posner's rule can be applied or, if it is applied, that its outcome is efficient.

This brings us to the second set of problems that arise by virtue of Posner's departure from Coase's argument. Coase relies on a fragile alliance of utilitarian and libertarian political moralities: Rational self-interested individuals promote total welfare through the process of free exchange. Both the utilitarian and libertarian justifications for the sort of economic analysis that takes its cue from Coase rely on this picture of individual interaction. When the market fails and transaction costs foreclose further trades, it is tempting to think that the decisionmaker has only a choice between the autonomy of the inefficient market and coercive, utility maximizing market intervention.

Market failures reveal the tension between utilitarian and libertarian underpinnings of economic analysis. The claim that economic analysis is grounded in utilitarian moral theory rests entirely on the fact that Pareto improvements increase utility. Since Posner's principle for assigning rights abandons the Pareto superiority criterion, it undermines whatever claim economic analysis has to a utilitarian foundation. While it follows from the fact that \( T \) is Pareto superior to \( S \) that \( T \) increases utility over \( S \), it does not follow from the fact that \( T \) is Pareto optimal that it involves an increase in total utility over the previous state of affairs with which it may well be Pareto noncomparable. Nor can we infer from satisfaction of Kaldor-Hicks that there has been an increase in utility.

Since it does not follow from the fact that \( T \) is Pareto optimal or that \( T \) is Kaldor-Hicks efficient to \( S \) that a move from \( S \) to \( T \) increases total utility, no utilitarian defense of the principle is forthcoming. Moreover, because the principle is by its very nature interventionist, no libertarian defense is in the cards either. The Coase argument had it both ways; Posner's version has it neither. In short, if Posner's principle is defensible, it is because the Kaldor-Hicks criterion is; but what justifies Kaldor-Hicks?

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7. For a fuller discussion of this point, see Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 Hofstra L. Rev. 509 (1980).

8. Posner's principle substitutes Kaldor-Hicks for the criterion of Pareto superiority. Kaldor-Hicks cannot be an index of utility, because it is subject to the Scitovszky Paradox. That is, \( T \) can be Kaldor-Hicks efficient to \( S \), and \( S \) Kaldor-Hicks efficient to \( T \); \( T \), however, cannot contain more total utility than \( S \) at the same time \( S \) contains more total utility than \( T \). Scitovszky, *A Note on Welfare Propositions in Economics*, 9 Rev. Econ. Stud. 77 (1941). For a demonstration of the Scitovszky paradox, see Coleman, supra note 7, at 519 n.14.
D. The Need to Justify Kaldor-Hicks

If there can be neither a utilitarian nor a libertarian justification for the Kaldor-Hicks criterion, what moral principle or set of principles can justify the pursuit of this sort of efficiency? One way of answering this question is to avoid it altogether by insisting that, in spite of appearances to the contrary, the operative efficiency criterion in normative economic analysis is that of Pareto optimality. The notion of Pareto optimality that relies on the outcome of free exchanges in the hypothetical, costless market can be called the “counterfactual” criterion of optimality. In contrast, a situation meets the “actual” criterion of Pareto optimality if, given existing transaction costs, no further mutually beneficial trades can be made. The difference between the two notions of optimality is straightforward: One restricts comparisons of social states by existing transaction costs; the other imagines trades and bargains that would be possible in the absence of transaction costs. The counterfactual criterion suffers from the fact that it is difficult to apply, in which case following Posner is not likely to produce optimal outcomes; or if Posner is serious about requiring that his principle be employed to reach optimal outcomes, it is not likely to be a very useful principle. The “actual” optimality criterion is introduced to resolve these problems.

Posner clearly intends his test to be applied counterfactually. That, after all, is the whole point of relying on Coase. Posner’s claim is that the law should act to produce the result those parties would have achieved had it not been for transaction costs getting in their way. The entire approach is predicated on the counterfactual model.

The actual model may be more workable, but it is considerably less interesting. Since economic analysis assumes that individuals make efficient trades until transaction costs prevent them from doing so, it is difficult to imagine which additional trades they might be capable of making in spite of transaction costs. Assigning the right to either party, more often than not, will be equally efficient by the actual Pareto criterion, since transactions costs make it very unlikely that the party who is not assigned the right can purchase it from the party to whom it is initially assigned. The “actual Pareto optimality” criterion is workable, but nearly useless as a guide to judicial lawmaking.

If the problem of justifying Kaldor-Hicks cannot be practically avoided, then it must be tested to see if it can stand on its own. The

9. See note 6 supra.
Coase Theorem involves not only a merging of two normally divergent political moralities—libertarianism and utilitarianism—it reveals as well two forms of normative justification—teleological and consensual. According to the teleological mode of justification, a social arrangement is evaluated in terms of its consequences: usually, but not necessarily, its impact on the welfare or utility of the affected individuals. According to the consensual mode of justification, a social arrangement is justified if the relevant parties agree to it. In Coase’s argument, the mutual gains through trade—the Pareto improvements—may be justified either because of their effect on the well-being of the parties to the trades, or because the parties consent to them. In the remaining two parts, I will evaluate attempts to justify the Kaldor-Hicks efficiency criterion in terms of these two modes of justification.

III. TELEOLOGICAL ARGUMENTS

A. The Rule Utilitarian Strategy

Each application of the Kaldor-Hicks criterion produces winners and losers. Suppose, however, that were the Kaldor-Hicks principle systematically applied over the long run, everyone would be better off than they were prior to the first application of the principle. In this case, the Kaldor-Hicks principle would be equivalent to an "extended" application of the Pareto superiority standard. A proponent of economic analysis could argue that while no particular change in the market that employs the Kaldor-Hicks criterion (as Posner’s version does) would be justified on utilitarian grounds, the long term practice of assigning legal rights according to the Kaldor-Hicks criterion would be. If the general practice of applying the Kaldor-Hicks criterion is justified on utilitarian grounds, each instance of it could be justified as an instance of a justified practice.

The problem with this strategy is that there is no guarantee for each individual that he will be no worse off at the end of the series of Kaldor-Hicks moves. An unfortunate individual may turn out to be a loser in every application of the Kaldor-Hicks principle; or if he is fortunate enough to win sometimes and lose others, there is no guarantee that his gains will fully cancel his losses. Because that argument fails, the claim that particular instances of the Kaldor-Hicks criterion are justified on indirect utilitarian grounds fails as well.

The long run application of Kaldor-Hicks might be justified on utilitarian grounds of a slightly different sort, however. It is possible
that over the long run, the application of the Kaldor-Hicks principle might increase net utility. The contention is that, when everyone’s satisfactions are taken into account, following a policy of Kaldor-Hicks reallocations leads to a net gain in utility, even though some individuals are worse off at the end than at the beginning. If it does, then individual instances of the Kaldor-Hicks criterion might be justified as instances of a long run policy justified on utilitarian grounds. The problem with this variation of the strategy is that it requires interpersonal utility comparisons of winners and losers to determine whether there has been a net increase in utility. But interpersonal comparability may not be possible, and were it, we would be in a position to evaluate particular applications of the Kaldor-Hicks criterion for their effect on utility. This strategy then is either impossible to carry out or otiose. Neither the strategy which relies on the equivalence of Pareto superiority to long term applications of Kaldor-Hicks nor that which relies on interpersonal comparability holds much hope for a proponent of Kaldor-Hicks.

B. Wealth Maximization

Many of the objections to normative economic analysis arise because the Kaldor-Hicks criterion is subject to the Scitovszky Paradox.¹⁰ The paradox blocks inferences from satisfaction of Kaldor-Hicks to claims about net utility, thus taking the rug from under utilitarian defenses of the Kaldor-Hicks criterion. One way of avoiding the paradox is to abandon the Kaldor-Hicks test as a means of ordering social states in terms of their utility. Instead, one might use Kaldor-Hicks to rank states of affairs in terms of some other characteristic, such as wealth. Because wealth, unlike utility, is measured in dollar equivalents, it is interpersonally comparable. Because substituting wealth for utility seems to obviate the range of difficulties that follow from the Scitovszky Paradox, it is worth pursuing further.

Posner proposes to substitute such a wealth maximization principle for a utilitarian conception of efficiency. However, Posner is not motivated to replace utilitarianism with wealth maximization because of the difficulties involved in employing the Kaldor–Hicks principle as an index of utility. Rather, Posner’s concern is the defensibility of the principle of utility itself. Posner argues that utilitarianism is an indefensible moral theory; consequently, all forms of

¹⁰. See note 8 supra.
economic analysis that are rooted in utilitarian moral theory\textsuperscript{11} are equally unattractive.\textsuperscript{12} In his view, rejecting utilitarianism as a moral theory requires rejecting Pareto economics. Thus Posner introduces the system of wealth maximization as a more attractive moral basis for economic analysis and as an alternative to the traditional Pareto criterion.\textsuperscript{13}

1. Wealth maximization and efficiency.

Posner claims that wealth maximization is an alternative efficiency criterion. Thus, he labels his approach to economic analysis the "wealth maximization/Kaldor-Hicks" approach, as if these were just two ways of talking about the same thing. Wealth maximization is not an efficiency criterion, nor is it just another name for Kaldor-Hicks.

The efficiency criteria—Pareto superiority, Pareto optimality, and Kaldor-Hicks—state ordering relations; they are means of ranking and comparing social states. By substituting wealth for utility maximization, we do not rid ourselves of the Pareto criteria; we simply use the criteria to compare states of affairs in terms of their relative wealth instead of their relative utility. Wealth maximization does not eliminate the Pareto criteria, but it does render them less important. When the efficiency criteria are used to order social states in terms of wealth, the interpersonal comparability problem does not arise because dollars, unlike utilities, are interpersonally comparable. A Kaldor-Hicks efficient change that involves wealth rather than utilities will be wealth maximizing. Perhaps this is the point Posner was really after in labeling his approach "wealth maximization/Kaldor-Hicks": not that the two are the same or that wealth maximization is an alternative to the Pareto criteria, but rather that wealth maximization does not have to rely on any criterion but Kaldor-Hicks.

\textsuperscript{11} See pp. 48–88; see also Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103 (1979).

\textsuperscript{12} Posner accepts the textbook objections to utilitarianism. These problems include boundary problems (whose preferences count in the utilitarian calculus); whether the goal should be to maximize total or average happiness; the lack of interpersonal comparability (a way to measure utility between persons); and the danger of instrumentalism (that individuals will be sacrificed to total social utility) which leads Posner to discern "moral monstrousness" in utilitarianism. See pp. 51–60.

\textsuperscript{13} For a criticism of Posner’s view that rejecting utilitarianism entails rejecting the Pareto criteria, see Coleman, supra note 7.
2. The teleological defense.

Wealth maximization is not an efficiency criterion; instead, it is an alternative to the utilitarian basis for justifying the pursuit of efficiency—in this case, Kaldor-Hicks efficiency. The real question is whether wealth maximization provides a morally defensible basis for pursuing Kaldor-Hicks improvements. Posner thinks it does. His objections to utilitarianism fall into two categories: technical and substantive.

The most troubling technical objections to utilitarianism concern boundary problems: Which preferences of which individuals ought to count in determining policy? The system of wealth maximization presumably obviates this kind of difficulty. Only preferences registered in a market count in a system of wealth maximization, and they count only to the extent that they are expressed monetarily. So while a utilitarian calculus might have to take account of the preferences of animals, foreigners, and indigents, the system of wealth maximization does not.

Unfortunately, avoiding these technical problems of utilitarian moral theory does not make wealth maximization morally more defensible than utilitarianism. Any number of consequentialist “moral principles” could avoid these problems. For example, why not evaluate actions or policies on the basis of their effect on the level of water in the seven seas of the world? An act is morally right as long as it raises the appropriate water levels, but morally wrong if it lowers them, and morally neutral otherwise. There are no boundary problems in determining the data that go into a calculation of right conduct; only the effect of conduct on the water levels in the seven seas counts. Merely obviating the technical problems of utility theory is hardly sufficient to recommend wealth maximization.

There need to be substantive grounds for preferring wealth maximization to utilitarianism. Posner notes that utilitarianism requires

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14. I should dismiss an obvious fall-back strategy for wealth maximization. The central claim of the fall-back position is that what people are willing to pay for something is an imperfect but reasonably accurate measure of the welfare or satisfaction they associate with it. In this view, wealth is valued neither in itself nor as an instrument in the pursuit of other things of value, but rather as a proxy for utility. The fall-back position fails to take wealth maximization seriously. Instead of considering whether wealth is a value, the fall-back position reduces wealth to a proxy value. Posner takes wealth maximization more seriously than this. Though he acknowledges that there is probably a weak correlation between wealth and utility maximization, Posner argues both that the two are distinct in the sense that policies formulated to pursue the one are likely to differ from those formulated to pursue the other, and that the pursuit of wealth is more morally defensible than is the pursuit of utility.

15. See pp. 76-79.
individual sacrifice for the common good. Sacrifice is a result of the consequentialist nature of moral reasoning in utilitarian theory; but wealth maximization also involves a consequentialist theory of moral reasoning. It too will require sacrifice. Either Posner believes that sacrifice in itself is an undesirable consequence of a moral theory, or he believes that some sacrifices are worse than others. Because he believes wealth maximization is more defensible than utilitarianism, his view must be that sacrificing in the name of promoting wealth is more defensible than sacrificing to promote utility. That is true only if promoting wealth is more defensible than promoting utility, and that is what remains to be shown.  

Many of Posner's arguments in favor of wealth maximization are really arguments against utilitarianism. The affirmative argument that Posner advances in favor of wealth maximization is that by pursuing wealth a society will achieve an attractive mixture of "happiness, of rights (to liberty and property), and of sharing with the less fortunate members of society." This argument relies on the very implausible speculation that a society would do better in its efforts to secure a recipe for the good by pursuing only one of its ingredients, i.e., social wealth, than by trying to follow the recipe it has in mind. The argument is too speculative to be convincing.

A good deal can be said against wealth maximization. According to wealth maximization, calculations undertaken by civil authority in the course of deciding among alternative legislative proposals are restricted to the preferences of those with money. In contrast, utilitarianism is committed to taking into account the preferences of all those who have an interest in some piece of legislation. Indeed, one source of utilitarianism's appeal is that there is a sense in which it treats people as equals: Each person counts for one and no more than one in the utilitarian calculus. Because wealth maximization fails to count everyone's preferences equally, it is incompatible with the principle of equal consideration of interests. And in that regard, wealth maximization fails to satisfy even the most minimal conception of what it means to treat individuals as equals, with due respect and concern.

16. Posner contends that wealth maximization is preferable to utilitarianism though he acknowledges that both require sacrifice. His view is that wealth maximization requires fewer sacrifices. But the numbers are not decisive. What counts is the goal served by sacrifice. And so unless Posner has an independent reason for thinking that wealth maximization is preferable to utilitarianism, the fact that it may require fewer sacrifices is of no moment.

My guess is that Posner is not particularly concerned with treating persons as equals, but he should be. If civil authority is concerned with individuals' preferences, it is because legislation affects the welfare of those individuals. Part of what it means to be concerned with the welfare of individuals is to be concerned with the effects of legislation on the frustration or satisfaction of their preferences. But to take seriously only the preferences of those with money is to excuse the government for failing to consider the interests of those people who are unable to express their interests monetarily. But it is a person's capacity for satisfaction and frustration—not his wealth—that imposes the duty upon civil authority to take into account the effect of legislation upon him.

The strategy of comparing the moral virtues of wealth maximization with those of utilitarianism fails Posner in two ways. First, his ultimate goal is to defend the Kaldor-Hicks criterion, which cannot be an index of utility. There is simply no direct utilitarian defense of Kaldor-Hicks, so it is unclear why Posner thinks the comparison is worthwhile. Second, to the extent the comparison is worth pursuing, wealth maximization seems to come in a distant second to utilitarianism.

IV. ARGUMENTS FROM CONSENT

An action, rule, or institution may be justified either in virtue of its consequences or because individuals consent to it. Instead of arguing for the Kaldor-Hicks criterion by showing that its application leads to other desirable social goals, one might argue that Kaldor-Hicks is justified either because individuals consent to it or because they would have consented had they been asked: that is, on actual or on hypothetical grounds. Moreover, one could argue either that each individual application of Kaldor-Hicks is justified because it is consented to, or that, even though not every application of the test is consented to, the long-run policy of applying that test to justify changes in law and public policy is. Finally, one could argue either that Kaldor-Hicks is consented to when it is used to recommend policy changes that have the desired effect on utility or that it is consented to when the desired effect is on wealth.

Any attempt to justify Kaldor-Hicks on consensual grounds must determine whether: (1) the consent that justifies is actual, hypotheti-

18. Posner is not keen on counting the interests of the unproductive or of those without wealth. These classes are nearly coextensive in his view. For a discussion, see Posner, The Value of Wealth: A Comment on Dworkin and Kronman, 9 J. LEGAL STUD. 243 (1980).
cal, or implied; (2) the justification applies to individual instances or long-run policies; and (3) the consent is to the wealth maximization or the utilitarian conception of Kaldor-Hicks.¹⁹

A. Actual Consent and Individual Instances

Kaldor himself first expressed the idea that the consent of the parties could justify particular instances of the Kaldor-Hicks test:

This principle [Kaldor-Hicks], as the reader will observe, simply amounts to saying that there is no interpersonal comparison of satisfactions involved in judging any policy designed to increase the sum total of wealth just because any such policy could be carried out in a way as to secure unanimous consent.²⁰

Kaldor’s view appears to be: A Pareto improvement is justified if consented to. The relevant parties give their consent either by engaging in an exchange or by accepting compensation ex post which renders them no worse off than they were prior to the implementation of the relevant policy. Because a Kaldor-Hicks improvement is a potential Pareto one, it might be similarly justified on consent grounds since compensation could be paid, thus securing the appropriate consent.

Kaldor’s argument involves three related claims: First, that the Kaldor-Hicks criterion is connected to the Pareto principle in a way that enables the justification of the latter to justify the former; second, that the Pareto principle is justified because it is consented to; and third, that the relevant parties give consent either by engaging in transactions or by accepting compensation ex post. Each of these claims is false.

1. Potential versus actual compensation.

Kaldor’s claim that a connection between the Kaldor-Hicks and

¹⁹. I am not claiming that Kaldor-Hicks can be used as an index of utility. Because of the Scitovszky Paradox, it cannot. The Scitovszky Paradox is a problem only when the justifiability of applying Kaldor-Hicks relies on the fact that doing so increases net utility. Under consensualism, the justification is that people agree to apply it—whether or not it increases utility. One can avoid the implications of the Scitovszky Paradox either by abandoning a utilitarian conception of Kaldor-Hicks in favor of, say, a wealth maximizing conception while maintaining a teleological or consequentialist mode of justification; or by abandoning a teleological justification in favor of consensual ones while maintaining a welfarist or utilitarian characterization of Kaldor-Hicks. The previous Part considered the first approach; this Part evaluates the second. Because the consensual justification does not require or preclude a utilitarian use of Kaldor-Hicks, I will, in what follows, shift back and forth between utilitarian and wealth maximization characterizations of Kaldor-Hicks. My doubts concerning the justification of Kaldor-Hicks apply to both.

²⁰. Kaldor, supra note 3, at 551 n.1.
Pareto criteria can justify the former in terms of the latter is reminiscent of the effort to justify the Kaldor-Hicks criterion on utilitarian grounds (by showing that over the long run Kaldor-Hicks is equivalent to the Pareto principle). Unfortunately, being capable of compensating a loser is hardly equivalent to actually compensating him. So even if compensation is sufficient to secure consent, being capable of rendering compensation is quite another matter.

2. Consent as an analysis and a justification for Pareto superiority.

The proposition that a Pareto improvement requires the consent of all affected parties can be understood as either an analytic or a normative assertion. Understood as an analytic claim, it means that a redistribution of resources constitutes a Pareto improvement only if everyone consents to it. As a normative claim, the proposition is that a Pareto improvement is justified in virtue of everyone's having consented to it.

The analytic claim is simply false. Though everyone's consent might be sufficient for the change to constitute a Pareto improvement, securing the consent of each individual is not necessary. Consider a simple example. Imagine a transaction between A and B that affects C and which makes everyone, A, B, and C, better off. While A and B consent to the transaction by engaging in it, C merely does not object to it. He neither endorses the transaction nor secures compensation from it. He therefore does not give his consent, yet the exchange is still a Pareto improvement.

Because securing unanimous consent is not necessary for a change to constitute a Pareto improvement, the justification of the Pareto criteria cannot require universal consent. We cannot maintain that the justification of each Pareto improvement involves the consent of all affected parties, if only because they need not all give their consent. We could obviate this difficulty in either of two ways. We could count as justified only those Pareto improvements that are universally consented to, but then the vast majority of Pareto improvements could not be justified on consensual grounds. Alternatively, we could redefine the notion of Pareto superiority to require that everyone consent to a change in policy before it counts as a Pareto improvement. Then, anything people agree to is a Pareto improvement, and nothing they fail to agree to can be. Our example of A and B acting to improve the lot of C would not be a Pareto improvement, even though the transaction between A and B makes them all better off. Moreover, anything people would agree to would count as
a Pareto improvement even though what they agree to need not make each better off. Both options are counterintuitive at best.

3. Consent by transaction or ex post compensation.

We are considering whether there is a consensual basis for each application of the Pareto superiority criterion because the argument we are extracting from Kaldor maintains both that there is such a basis and that the consensual justification for the Pareto criterion can be shifted to the Kaldor-Hicks criterion. Assume that individual Pareto improvements are justified because they are universally consented to. The question then is how individuals give their consent to Pareto improvements. Current economic theory distinguishes between two ways of giving consent: by engaging in a transaction or by accepting compensation ex post. If a policy makes Jones worse off, he would not normally consent to it. If, however, he is fully compensated, he thereby gives his consent. The last claim involved in Kaldor's consent argument is that an individual gives his consent by accepting compensation. Of course, Kaldor's particular version of this argument also requires that the consent involved in justifying the Pareto principle be transferred to defend the Kaldor-Hicks principle. Because there is a serious difference between actual and hypothetical compensation, the equivalence Kaldor was after is not in the cards.

Suppose that accepting compensation for a loss constitutes giving one's consent to the activity or policy that creates it. Since the kind of compensation involved in the Pareto principle is not involved in the Kaldor-Hicks principle, a proponent of a consent defense of individual applications of the Kaldor-Hicks criterion would have to show that Kaldor-Hicks involves its own sort of compensation. Consider the following: One way in which the Pareto and Kaldor-Hicks principles differ is with regard to the compensation of losers ex post. Paying compensation is a transaction with associated costs. Because losers are not compensated ex post, transaction costs are lower whenever the Kaldor-Hicks principle is applied instead of the Pareto superiority principle. The difference in transactions costs translates into lower overall costs under Kaldor-Hicks. These reduced costs constitute a kind of ex ante compensation. Provided compensation is full, it does not matter from a moral point of view whether one receives compensation before or after suffering a "loss." There is no need, then, as Kaldor thought there was, to allege a connection between Pareto superiority and Kaldor-Hicks to justify the latter on consent grounds. If compensation constitutes consent, then the argument
from ex ante compensation shows that the Kaldor-Hicks criterion involves its own sort of compensation. Because it does, Kaldor-Hicks may be justified on consensual grounds, quite apart from an alleged connection between it and the Pareto criterion.

The consent arguments for both the Pareto and Kaldor-Hicks criteria rely on the claim that accepting full compensation for a loss constitutes consent to the loss and to the activity that causes it. They differ only with respect to when compensation is paid. But compensation, whether ex ante or ex post, does not constitute consent. Consider first an example of ex post compensation. Suppose that in the course of engaging in a profitable manufacturing enterprise you lead me to suffer serious harm through your failure to implement adequate safety measures at the plant. I sue you for damages and secure a judgment against you. I then accept full compensation from you. Because compensation is full, I am no worse off than I was prior to the accident. You are better off than you were before you engaged in this profitable manufacturing endeavor. If we assume that no third parties are worse off than before the accident, there has been a Pareto improvement. You are better off risking harm to me (and compensating me should harm occur) than you would be if you did not engage in the risky activity. Provided I am fully compensated for my injury, I am no worse off than before. Yet it hardly follows that by accepting compensation I have given my consent to your failure to take adequate safety precautions.

If I am entitled to compensation for damages, I can either accept or refuse it. According to the view that compensation equals consent, if I accept compensation, I thereby give my consent to the harm. Consequently, the only way I can withhold my consent is by refusing compensation. But, ordinarily my refusal to accept compensation means that I have waived my right to be recompensed in the event of harm. That is, in effect, I have consented to the harm. Under the ex-post-compensation-as-consent view, if I refuse compensation because I feel it is unwarranted or inappropriate I thereby withhold my consent to the harm; but if I accept compensation because I feel it is my due I thereby give my consent to the harm. Precisely where we ordinarily infer that a refusal of compensation is consent to being harmed, the ex-post-compensation-as-consent argument holds that I have not consented; and where we ordinarily infer withholding consent to harm, this view maintains that we are actually consenting. The ex-post-compensation-as-consent argument is extremely implausible.
The claim that ex ante compensation constitutes consent is no less troublesome. Suppose you are deciding whether to purchase housing in either of two neighborhoods. In one, housing costs are high, but the crime rate is very low. In the other, housing costs are lower, but the crime rate is much higher. Assume that the only way of accounting for the difference in purchase prices is by the difference in crime rates. You buy the house in the riskier neighborhood. In the economist’s view, the lower costs constitute ex ante compensation for future losses owing to criminal mischief. Suppose that your house is burglarized, your possessions taken. What sense does it make to say that you have consented to the burglary or to the accompanying loss? Would we permit the thief to introduce your “consent” as a defense in court? Would we be committed to saying that crime in the central cores of our cities is justified because the victims have consented to it by paying lower prices?

In The Economics of Justice, Posner considers but ultimately rejects my objection. He characterizes my objection as the complaint that he is using the term “consent” in a philosophically unconventional manner. Though he does not deny that his usage is unconventional, Posner argues that a person who accepts ex ante compensation for the risks he freely takes has no grounds of complaint on fairness grounds in the event he turns out to be a loser.

T. S. Ulen has also addressed and partially dismissed my objection. He concurs that my argument against ex post consent is a good one, but is not convinced that it applies to cases of ex ante compensation. My point is that consent and compensation are concepts that are defined by different criteria: Accepting compensation just is not the same thing as giving consent, no matter at what time the compensation is offered and accepted.

Ulen does not give reasons for drawing the distinction he makes regarding the validity of my objection between ex ante and ex post compensation, but he must have in mind something of the following sort: When people injured in an accident accept compensation ex post for their losses, they haven’t, as it were, given up the right to complain about what happened to them—a right which they presumably would have given up had they actually consented to the injury. So their accepting ex post compensation is not tantamount to

21. Professor Posner does not find persuasive my criticism of his reliance on compensation as constitutive of consent, and he ultimately rejects my objection. See pp. 97–98.

their giving consent. On the other hand, when people accept a lower
cost as compensation for taking a risk, then, in the event things take a
turn for the worse, they do lose their right to complain. Individuals
who give their consent to losses waive their right to complain as do
individuals who accept ex ante compensation. Therefore, accepting
ex ante compensation is tantamount to giving one's consent. This
line of argument must also be at the heart of Posner's reply.

The problem with this argument is that a loser may be without
legitimate grounds to complain for at least two reasons: One is that
he has agreed to take the loss; the other is that for reasons other than
his having consented to it, it is fair to impose the loss on him. Wrong-
doers justly imprisoned do not choose to be there. The losses or bur-
dens they bear are nevertheless fairly imposed upon them. They have
no legitimate complaint. You and I play a game, say tennis, accord-
ing to the rules. You win, I lose. I have no ground for complaint; the
loss is fairly imposed upon me, though I have not consented to it. I
enter a lottery. I take a chance; I lose. If the lottery is a fair one, so is
my loss. Posner is right in thinking that in this sort of case I have no
grounds for complaint. But he is wrong in thinking that the reason I
am without recourse is that I have consented to the loss.

To sum up: The difference between Pareto and Kaldor-Hicks is
just the difference between ex post and ex ante compensation. If
both the Kaldor-Hicks and the Pareto criteria are justified on consen-
sual grounds, it is because accepting compensation either ex ante or
ex post constitutes consent. By accepting compensation ex post for a
loss, one does not thereby consent to the activity that caused it. By
accepting compensation ex ante, one may consent to taking a risk.
But this is not equivalent to securing one's consent to taking a loss;
consenting to a risk is, after all, different from consenting to a loss.

B. Hypothetical Consent and Individual Instances

Instead of claiming that actual consent justifies individual Pareto
or Kaldor-Hicks improvements, one might shift to arguments from
hypothetical consent: Pareto and Kaldor-Hicks improvements are
justified because the individuals affected by them would have given
their consent to them. Consider how an argument from hypothetical
consent might be constructed to justify a Pareto improvement.23

23. The argument I make in this section against hypothetical consent is presented in
terms of Pareto improvements, rather than Kaldor-Hicks ones, simply to facilitate its presen-
tation. The mode of justification is the same in both cases: An improvement, Pareto or
Kaldor-Hicks, is justified because people would have agreed to it. That is, the favored social
Suppose $A$ destroys some piece of $B$'s property, then fully compensates him. $B$ is, therefore, indifferent between his property not being destroyed and his being fully compensated. If it would have cost $A$ a good deal more to avoid destroying $B$'s property than it would cost him to destroy it and compensate $B$ for the loss, $A$ will prefer destroying and compensating to not destroying at all. If $A$ more than fully compensates $B$ for the loss, $B$ will also prefer the damage and compensation to maintaining the integrity of his property. $A$'s destroying the property and compensating $B$ makes them both better off; in other words, it constitutes a Pareto improvement.

No doubt we might justify this Pareto improvement on the ground that it increases the welfare of both $A$ and $B$. That would not be a consensual defense however. On the view we considered in the previous section, we could argue that the transfer is justified because by accepting $A$'s compensation $B$ consents to the transfer. That hardly seems right since we are in the habit of referring to such transfers as "forced exchanges." The consent, if there is any, must be of the hypothetical sort.

Consider and compare the two states of affairs our example involves:

Let $S$ be that state in which at substantial cost to himself $A$ avoids destroying $B$'s property.

Let $T$ be that state in which $A$ destroys $B$'s property and then more than fully compensates $B$.

If we had put the question to both $A$ and $B$ prior to $A$'s destroying $B$'s property, "Which state of affairs, $T$ or $S$, do you prefer?" both would have said $T$. Because both $A$ and $B$ would have preferred $T$, each would have agreed to have $A$ harm $B$ in exchange for more than full compensation. $T$ is justified, not because by accepting compensation $B$ consents to the "exchange," but because both $A$ and $B$ would have consented to it. The Pareto improvement that results from this mixture of harm, savings, and restitution is justified on hypothetical state would have been ranked higher in each person's preference ordering and therefore each would have consented to it. There is a difference between the two principles. In Pareto, $A$ and $B$ presumably would have consented to a Pareto improvement because each would have been made better off, or at least no worse off by it. In Kaldor-Hicks, at least one person’s preference depends on his willingness to risk being made worse off. The exact compensation involved in a Kaldor-Hicks move may or may not be complete. If it is full compensation for the loss, then Kaldor-Hicks is equivalent to Pareto: It cannot be full. If it is less than full, then individuals are foolish to take it, unless it is full compensation for the risk. But if it is full compensation for the risk of loss, it cannot be, by definition, full compensation for the loss, since the concepts of risk and actual loss are obviously distinct. So ex ante compensation cannot as a matter of logic constitute consent to a loss under Kaldor-Hicks.
ical consent grounds. The argument can presumably be extended to cover all Pareto improvements.

When advocates of economic analysis allege a consensual basis for the Pareto superiority criterion, it is this sort of argument, I believe, they must have in mind. Thus the position proponents of a consensual basis for Pareto superiority want to defend is not the same one Kaldor and Posner apparently advocate: one based on actual consent. Instead, it is the complex claim that Pareto improvements are justified either because they are in fact consented to (as in cases of free exchange) or because rational persons would have consented to them. Pareto redistributions of resources are justified then because they involve trades that people either did make or which they would have made given the choice.

Arguments from hypothetical consent proceed by inferring an individual's consent from his ordering of preferences. Any argument from a statement of an individual's preferences to what he would have consented to works only if: (1) it follows as a matter of logic that individuals would choose whatever they prefer, or (2) rational individuals in fact always act to maximize utility through Pareto improvements. The problem with the first approach is that it does not treat consent as conceptually distinct from preference satisfaction. For in this view to say that $A$ prefers $T$ to $S$ is simply to say that, if given the opportunity $A$ would have chosen $T$ over $S$. Hypothetical consent is contained within what it means to prefer one state of the world to another, so that it is logically impossible to have withheld one's consent from that which increases one's welfare. In that case, consent plays no independent justificatory role. One might just as well say going from $S$ to $T$ is justifiable because it makes both $A$ and $B$ better off, in which case the consent component of the argument is merely excess baggage.

On the other hand, if consent is viewed as logically distinct from preference ordering, then some individuals will care how they go from one social state to another. For example, they will care whether they advance through planning and hard work on the one hand, or whether their advancement is the work of divine or civil intervention.

One way of putting this point is that the social state a person consents to is not a judgment made independently of the path used to achieve it, though his ordering of the relevant social states is. Just

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24. Posner, particularly, shifts haphazardly back and forth between actual consent and hypothetical consent as if they contribute the same sort of justification for an institution or practice.
because I prefer $T$ to $S$ does not mean that I am indifferent among
the various ways in which $T$ can be brought about. Suppose that in
$S$ you have the gold and I do not; in $T$ our places are reversed. I
surely prefer $T$ to $S$. But there are numerous ways of going from $S$ to
$T$. In one, I win the gold from you fair and square; in another, you
give it to me; in yet a third, I steal it from you; in a fourth, my friend
steals it and gives it to me. I would choose to move from $S$ to $T$
according to the first two paths; but I would not agree to take steps to
achieve $T$ if it meant following either of the last two. In every case, I
prefer $T$ to $S$; but only in two of the four cases described can you
infer my hypothetical consent. Because consent is a richer concept
than preference ordering, what a person would have consented to
cannot be inferred from an ordering of his preferences.

One might obviate this problem by describing more fully the
competing social states to include their path dependent characteris-
tics. My preferences will be more finely distinguished. I prefer $T$ to
$S$ where $T$ is my having the gold after winning it fair and square, or
where $T$ is my receiving the gold from you as a gift. I do not prefer
$T$ to $S$ where $T$ is my illegitimately securing the gold.

Once we describe social states to include the paths that bring us
to them, arguments from hypothetical consent become a good deal
less promising. Suppose that $A$ can avoid breaking a window of $B$'s
house only by curtailing his very profitable blasting business. His
loss would be $100.00. The cost of a broken window to $B$ would be
$10.00. Suppose that prior to $A$'s commencing blasting, $A$ would
have offered $B$ $20.00 in the event of breakage. Both $A$ and $B$ would
have preferred $A$'s breaking the window and paying $B$ $20.00 to $A$'s
having to forego blasting. It supposedly follows that when $A$ blasts,
breaks, and then compensates, the Pareto improvement that results is
justified because both parties would have agreed to the deal $A$ forces
upon $B$.

If what one consents to is path dependent, however, $B$ may have
none of this, for what he truly prefers is an ex ante agreement
between $A$ and himself whereby $A$ blasts, breaks, and then compen-
sates per the terms of an actual agreement. When paths are included,
$B$ prefers $T$ to $S$ only where $T$ is described to include its coming
about by actual agreement rather than by forced exchange. To the
extent that actual agreement or consent is a legitimate constraint on
the paths taken to preferred social states, arguments from hypotheti-
cal consent will be subverted, since the very purpose of an argument
from hypothetical consent is to impart justification where actual consent has not been or cannot be secured.

In general, if it follows from the fact that both A and B prefer one state of affairs to another that they would have consented to the preferred state, then their hypothetical consent is contained, as it were, in their preference ordering. In that case, consent collapses into self-interest. In contrast, if hypothetical consent is an independent criterion of justification, then there is no guarantee that people would choose to be in their preferred social states. This sounds implausible until one realizes that while one's ordering of social states is path independent, one's choices about which states to be in are not.

If we overcome this obstacle to hypothetical consent arguments by building descriptions of paths into descriptions of social states, we may drastically reduce the force of hypothetical consent arguments. For in many cases what is crucial to an individual's preferring one state to another is the hand he or she plays in bringing it about: that is, his actual consent.

In short, arguments for economic efficiency that rely on hypothetical consent either: (1) do not really rely on hypothetical consent, but on teleological considerations of self-interest instead; (2) need not be sound, since individuals need not always choose to make themselves better off; or (3) fail because the preferences from which conclusions about hypothetical consent are drawn may be for social states that require increasing welfare by actual agreement only. All that remains is to consider the defense of Kaldor-Hicks at the level of social choice.

C. Consent and Social Choice

When we elevate consent arguments to the level of social choice, the claim is not that each individual loser consents to his particular losses, but rather that individuals conceived of in a certain way—rational, with a particular attitude toward risk and a moral sense—would choose to apply the Kaldor-Hicks criterion. The individual losses that result from Kaldor-Hicks improvements would be justified because losers and winners consented ex ante to pursue policies with the risk that some would come out on the short end. The justification of particular losses is a matter of fairness, not consent. The principle of consent would apply to the justification of the institutions, the principle of fairness to individual losses.

When the argument from consent is applied at the level of social choice, its adequacy conditions change. Proponents of the argument
for Kaldor-Hicks from social choice do not have to show that every individual loss is consented to; they must prove the much stronger claim that, from among the full set of principles available to guide institutional design, individuals would choose to have their institutions framed by the Kaldor-Hicks criterion. In other words, the proponents must show not only that individuals would choose Kaldor-Hicks over, say, the Pareto principle, but that they would choose the pursuit of efficiency through Kaldor-Hicks improvements over every other conception of the good, including, for example, various forms of libertarianism and Rawlsian justice available to them. Otherwise, it would be impossible to justify particular instances of the Kaldor-Hicks principle by appealing to considerations of institutional consent or choice.

Arguments advanced at the level of social choice typically call for hypothetical, not actual, consent. For the reasons I have already alluded to, there are sufficient grounds for doubting the ultimate justificatory force of arguments of this sort.25

In contrast to the prevailing wisdom among social choice theorists, arguments from hypothetical consent do not, in my view, provide the foundation upon which a set of first principles can comfortably rest. Sometimes arguments from hypothetical consent carry no moral force whatsoever. For example, if Jones would have loaned you a tidy sum of money had you asked, that provides me with no particular reason for thinking that I ought to make such a loan to you. The fact that I would have sold you, had you asked, a painting by Stella for $10,000 does not imply that I am bound to accept your taking the painting from me and leaving in its place a check made out to me for $10,001.

Certainly a person is not bound by what he would have agreed to under conditions other than those which in fact obtain in the same way that he is bound by his actual agreements. However, arguments from hypothetical consent are not entirely without normative punch. Suppose that you and I felt that the political and legal institutions that governed our lives were basically unjust. We then took it upon ourselves to imagine a set of basic principles that we would employ to restructure our society if the opportunity were to arise. In this thought experiment, we might find ourselves considering which principles individuals stripped to their rational, moral cores would choose. The choices such individuals would make would be con-

strained by the bounds of rationality and would be free from the bias and predispositions that would be reflected in our choices. If we could successfully carry out this experiment, its outcome would not be without normative force in our deliberations.

The decisions reached by our hypothetical contractors have substantial weight even if we do not believe that their choices bind us in the same way that the agreements we make do. Someone intent on reconsidering the basic structures of society might well want to know which principles rational, moral agents facing choice under conditions either of uncertainty or risk would choose to guide the design of their institutions, not because their choice is binding upon him, but because their choice constitutes one well-developed, rationally constructed, and powerful answer to his question—one he cannot simply ignore.

I have doubts not only about the ultimate justificatory force of arguments from hypothetical consent, but about whether there is a unique solution to the decision problem at the level of social choice. I do not see how one can generate a unique principle or set of principles from the "original position" without sneaking the outcome into the characterization of the problem. For example, in Rawls's view, people in the original position are making a choice under uncertainty.26 Under those conditions they choose the difference principle. In Harsanyi's view, people in the original position make a choice under conditions of risk.27 Under these conditions, they choose to maximize expected utility. The result is entirely dependent on a very fine distinction in the characterization of the problem. I do not see how we can determine in a non-question begging way whether the choice being made is reached under conditions of uncertainty or risk; nor do I understand why the ultimate justification of a principle of justice can rest on so fine a distinction. Agnosticism and pluralism are the right attitudes to take toward social choice problems.

This brings us to Posner and wealth maximization. It is one of the oddities and failings of this book that although Posner informs the reader at the outset that he intends to defend an efficiency conception of justice as a first principle—that is, as a criterion for the basic structure of society—he never really advances an extended discussion of either his conception of the problem or its solution. The vast

28. See pp. 6–7; see also preface at vii.
majority of his arguments are ill-fated attempts to defend individual *instances* of Kaldor-Hicks or particular *institutions* which he views as involving the Kaldor-Hicks criterion. These arguments all rely on ex ante compensation as constitutive of consent. They all fail.

Posner should have been arguing for ex ante consent at the level of social choice. His failure to provide detailed arguments at this level is troubling for two reasons. One, his echoing of Rawls's remark about justice applying to the basic institutions of society leads the reader to expect such an argument. Two, an argument from social choice is the only one that ever really stood a chance of working in his favor.

At this level, the question for Posner is whether rational individuals would choose to frame their institutions in conformity with the Kaldor-Hicks criterion of wealth maximization. What little Posner has to say about this question is more troublesome than helpful. He does not characterize the choice problem other than to say that his individuals are risk neutral and in possession of full information regarding their circumstances. I doubt that such individuals would choose to maximize wealth. Whether or not they would, his argument is hardly convincing: It blatantly ignores the constraints put on arguments from social choice by the leading theorists working in this area—Rawls and Harsanyi—and does so without explanation.

Moreover, Posner ascribes risk neutrality to his decisionmakers, but no attitude toward risk is particularly rational. The appropriate attitude toward risk depends on the circumstances. If risk neutrality is a requirement of rationality, then rationality would require some terrible gambles: for example, risking a very great deal to try for a very marginal gain, where the likelihood of loss is very slight and the likelihood of securing the gain very great. If the Kaldor-Hicks criterion is the outcome of the social choice problem faced by rational, risk-neutral individuals, in full knowledge of their circumstances, we should hardly take that as an argument in its favor. On the other hand, if those are the only conditions under which individuals would

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32. P. 100.
34. Though Rawls and Harsanyi disagree about what one gets out of the original position, both agree that the absence of information about one's position in life is fundamental to the fairness of the mechanism and absolutely essential to any claim to moral justification the outcome of the process might have. See J. RAWLS, *supra* note 26; Harsanyi, *supra* note 27.
choose to maximize wealth through the Kaldor-Hicks institutions, the system of wealth maximization as a conception of justice remains in desperate need of justification.

I do not mean to suggest that there are never any good reasons for pursuing efficiency or that doing justice is invariably inconsistent with promoting efficiency. My point is the more modest one that Kaldor-Hicks/wealth maximization is not a defensible conception of justice. This does not mean that there are never any grounds for making Kaldor-Hicks improvements or for promoting social wealth. Rather, whether or not a Kaldor-Hicks efficient change in policy is warranted or an institution designed to maximize wealth is justified depends on a much richer conception of moral agency, the good, justice, institutional competence, and the nature of the state than Posner and other advocates of economic analysis have conceived.