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EFFICIENCY AND INDIVIDUALISM

GARY LAWSON†

INTRODUCTION

Law and economics—the systematic application of neoclassical price theory to legal problems[1]—has dominated the legal academy in recent years. One recent study found that law and economics "for several decades appears to have pervaded about one quarter of scholarship in elite law reviews,"[2] and that figure may seriously

† Associate Professor, Northwestern University School of Law. B.A. 1980, Claremont Men's College; J.D. 1983, Yale Law School. I am deeply indebted to David D. Friedman, who patiently corrected many errors and tried to warn me of others. Any errors that remain are attributable solely to my stubbornness. I have also benefitted from comments by Anthony D'Amato, John J. Donohue III, Mark F. Grady, David Haddock, Herbert Hovenkamp, Keith N. Hylton, James Lindgren, Thomas W. Merrill, Geoffrey P. Miller, Michael B. Rappaport, Murray N. Rothbard, John Earle Strong, and Martin Zelder.

1. More precisely, law and economics is the systematic application of theories of rational choice to legal problems, though neoclassical economics is by far the most popular rational choice model. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 15–52 (1988) (describing the role of neoclassical price theory in law and economics); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–10 (3d ed. 1986) (same). In its broadest, least contentious form, rational choice theory simply posits that people use the scarce means at their disposal, including their ability to discover, create, or imagine new resources and opportunities, to maximize their attainment of desired ends. Beyond that point, the theory of rational choice fractures along several lines. One disagreemeut concerns the epistemological status of the basic rational choice thesis: Is it an axiom implicit in the concept of human action, a testable empirical hypothesis, or an instrumental assumption selected for its ability to generate useful predictions? A second, and closely related, disagreement concerns the meaning of rationality in the theory of rational choice: Does rationality in this context mean only purposefulness or does it also assume or hypothesize some degree of consistency, clarity, efficacy, etc.? A third related disagreement concerns the scope and qualitative character of the conclusions that one can derive from rational choice theory. My Article is concerned principally with this last category of disagreements; I aim to clarify the permissible scope and character of arguments that employ the concept of "social efficiency."

2. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 28 (1989). Professor Ellickson surveyed annual volumes of the *Harvard Law Review*, the *Stanford Law Review*, the *University of Chicago Law Review*, and the *Yale Law Journal* at five-year intervals, ending with 1985–1986.

understate the theory's influence.[3] A number of justifiably well-regarded scholarly journals devote themselves almost exclusively to economic analysis of law,[4] and the subject is now a regular part of law school curricula.[5] Perhaps most importantly, law and economics is a pervasive and influential presence in informal academic discussions. Even legal scholars who profess no significant interest in law and economics can and do talk with facility, if not always with perfect understanding, about such law and economics staples as marginal cost curves, Kaldor-Hicks efficiency, and the Coase Theorem.[6] Interest in law and economics may have levelled off in the past few years,[7] but advocates of an economic approach to legal analysis cannot be displeased with their progress.[8]

Despite law and economics' undeniable success, however, some very basic methodological issues remain strangely underdeveloped. Serious threshold questions about the meaning and coherence of some of law and economics' central concepts must be answered before one can properly assess either positive or normative applications of the theory.[9] In particular, it is common knowl-

3. The study counted only articles that were "friendly to the economic paradigm and also made use of, or cited many works in, economics or law and economics." *Id.* at 27. A more accurate test of influence would not only survey a broader range of journals, *see id.* at 28 n.15, but would also consider the extent to which advocates of noneconomic approaches to legal scholarship deem it necessary to take account of or criticize law and economics.

4. I have in mind the *Journal of Law and Economics*, the *Journal of Law, Economics, and Organization*, and the *Journal of Legal Studies*.

5. The 1991–1992 AALS Directory of Law Teachers lists 111 law professors at 85 schools who formally teach a course in law and economics. ASSOCIATION OF AMERICAN LAW SCHOOLS, 1991-92 AALS DIRECTORY OF LAW TEACHERS 1078–79 (1991). There is no way to estimate the extent to which law and economics permeates the teaching of substantive courses.

6. *See* JULES L. COLEMAN, MARKETS, MORALS, AND THE LAW 67 (1988).

7. *See* Ellickson, *supra* note 2, at 26 ("[L]aw and economics is no longer growing as a scholarly or curricular force within the leading American law schools.").

8. For an upbeat report on the status of law and economics from its best-known booster, see Richard A. Posner, *Comment on Donohue*, 22 LAW & SOC'Y REV. 927, 928–29 (1988).

9. The positive and normative projects of law and economics are distinct enterprises that must be analyzed and evaluated separately. *See* POSNER, *supra* note 1, at 20–21. In its positive guise, law and economics purports to predict legal events, such as the general trend of outcomes of common law adjudications, or to describe the consequences of legal rules, such as minimum wage laws or a negligence standard for tort liability. In its normative guise, law and economics, as does any other normative legal theory, purports to guide the decisionmaking of judges, legislators, and other legal actors. One can embrace some or all of the positive project(s) of law and economics while rejecting its normative

edge among law and economics scholars that the oft-employed concept of "social efficiency" is a highly equivocal term; this Article examines six different meanings of the concept, and I make no claim to completeness. Yet much of the law and economics scholarship, most of the critical literature,[10] and virtually all casual conversation concerning law and economics either employs the concept of social efficiency without defining it or defines it in a way that plainly renders it incoherent or empty.[11] The most sophisticated law and economics scholars, exemplified by Judge Richard Posner,[12] do in fact employ a coherent and robust con-

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component, and vice versa.

10. Criticism of law and economics has become a cottage industry. For a small but representative sampling of criticism of various law and economics theses that spans the jurisprudential and ideological spectrums, see COLEMAN, *supra* note 6, at 95–132; MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 126–85 (1987); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991); Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513, 514–19 (1989); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 2–5 (1986); Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815 (1990); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1979); Robin Paul Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner, and the Philosophy of Law and Economics*, 36 U. KAN. L. REV. 209 (1988); Joseph M. Steiner, *Economics, Morality, and the Law of Torts*, 26 U. TORONTO L.J. 227, 234–39 (1976).

11. "Incoherent" and "empty" are terms often used but seldom defined. The literal meaning of "coherence" is "the quality or state of holding together." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 440 (1986). A theory or concept can be incoherent—can fail to hold together—because it is contradictory or unintelligible, embodies a category mistake, *see infra* note 30, or is so unconnected to reality as to fall outside the bounds of rational discourse. By "empty" I mean "having no actual referent in the real world." "Leprechauns," for example, is an empty concept, though "mental images of leprechauns" is not empty. There is of course a necessary temporal dimension to emptiness (no referent now? no referent ever?), but to take account of this dimension here, or to explain how to identify the referents of relational concepts like "wide" or "the," would add complexity without advancing understanding.

12. This use of Judge Posner as an exemplar should not obscure the pioneering contributions of such giants as Gary Becker, Guido Calabresi, Ronald Coase, Harold Demsetz, William Landes, and Henry Manne. Nor should one ignore the dozens of contemporaries of Judge Posner, many of whom sharply disagree with him on questions of policy and method and have helped mold the present shape of law and economics. But it is surely no accident that Judge Posner's professional career neatly tracks law and economics' rise to glory. Both alone and in his numerous collaborations with Professor Landes, Judge Posner gave definition to the positive project of law and economics. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1st ed. 1972); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987). In addition, he almost singlehandedly constructed a systematic defense of wealth maximization as a moral guide. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 48–115 (1981) [hereinafter POSNER, ECONOMICS OF JUSTICE]; Richard A. Posner, *Wealth Maxi-*

ception of social efficiency, but at the cost of cutting the term "efficiency" loose from its ordinary-language moorings and thereby raising a serious danger of equivocation.

This Article explores the implications of methodological individualism for economic arguments that employ the concept of "efficiency" in a social context.[13] In Part I, I describe the principles of methodological individualism that ought to guide sound economic analysis. In particular, I set out at some length the meaning and implications of economic subjectivism, including the critical implication that interpersonal comparisons of utility or satisfaction are, if given a straightforward interpretation, meaningless. The impossibility of such comparisons is almost an article of faith among modern economists. I argue that the economists are correct in an important sense, but that the problem of interpersonal comparisons is far more complex and subtle than is often recognized. Specifically, I describe the different contexts in which the subjectivist position is correct and incorrect, and I explain how the position can be reconciled with our obvious ability in everyday life to make useful and intelligible comparisons of satisfaction across persons.

In the abstract, the principles of methodological individualism are widely accepted by law and economics scholars. In practice, they are frequently honored in the breach. Thus, in Part II, I use these principles to analyze the concepts of economic efficiency that form the bedrock of virtually all normative, and much descriptive, economic analysis of law. I demonstrate that many of those concepts are either unintelligible or empty and thus cannot serve as premises in sound normative arguments or descriptive state-

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mization Revisited, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85 (1985); *see also* Lloyd Cohen, *A Justification of Social Wealth Maximization as a Rights-Based Ethical Theory*, 10 HARV. J.L. & PUB. POL'Y 411 (1987) (analyzing Judge Posner's theory about the correspondence between moral intuition and wealth maximization).

13. I do not explore the implications of ethical individualism for law and economics. *See infra* note 16 and accompanying text. It is worth noting, however, that Judge Posner has recently acknowledged that a moral theory grounded in economic efficiency—or, as he terms it, social wealth maximization, *see infra* notes 107–08 and accompanying text—gives insufficient weight to established ethical traditions of individualism. The ethic of wealth maximization "treats people as if they were cells of a single organism," which "implies that if the prosperity of the society can be promoted by enslaving its least productive citizens, the sacrifice of their freedom is worthwhile." According to Judge Posner, such an implication is "contrary to the unshakable moral intuitions of Americans." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 376–77 (1990).

ments[14]—unless one holds, as I believe Judge Posner does, a very thin conception of the purposes and possibilities of moral discourse. I then argue that the one concept of efficiency that is both coherent and robust in a social setting—the concept of wealth maximization—is far enough removed from ordinary understandings of efficiency to give rise to the very real possibility of equivocation.[15] Briefly stated, to the extent that the term "efficiency" refers to human satisfaction, it is incoherent or empty whenever a large number of people are involved; to the extent that "efficiency" does not refer to human satisfaction, that fact should be made clear, and arguments or descriptions using the term must be carefully scrutinized with that limitation kept in mind.

In the course of Part II's discussion, I also identify the overtly anti-individualistic moral assumptions that are implicit in the most commonly used normative theories of economic efficiency. Because an adequate normative critique of law and economics (or of any other approach to law) would require presentation and validation of an objectively true moral theory,[16] I do not draw from this identification any conclusions regarding the merits of law and economics; nevertheless, this identification deserves recogni-

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14. The argument is different from the more common complaint that economic models are unrealistic. That is in fact no complaint at all. Every model is unrealistic by definition; the only serious question is whether the model's omissions from (or additions to) reality are important enough to vitiate its usefulness. *See* POSNER, *supra* note 13, at 365–67; POSNER, *supra* note 1, at 15–17. My complaint is that certain concepts of efficiency are either unintelligible or entirely useless for prescriptive and (certain) descriptive purposes. None of this is necessarily a problem for persons who are interested only in making predictions, *see infra* notes 64–66 and accompanying text, so at least part of the positive project of law and economics has nothing to fear. Those who would base prescriptions or descriptions on premises that are known to be incoherent or empty, however, need very good reasons for doing so.

15. Herbert Hovenkamp has cogently raised similar concerns about the use of the term "welfare" by law and economics scholars. *See* Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 68–69 (1990) (pointing out the difference between the meanings of "welfare" held by economists and by ordinary people).

16. Although I have previously defended a less onerous standard for evaluating normative discourse in legal scholarship, *see* Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 775–83 (1988), I was wrong. If one cannot provide a rational grounding for one's normative claims, it is hard to see what intellectual purpose they serve. There is at least one quasi-normative activity, however, that can profitably be pursued without getting hopelessly mired in metaethics: One can discuss the implications of a given normative theory in "if . . . then" form. This is in fact a form of positive, descriptive analysis, which can be of considerable interest or value; but it does not constitute serious normative analysis unless the underlying theory can be validated.

tion. Part III contains brief concluding remarks about the future course of law and economics scholarship.

I come neither to bury law and economics nor to praise it; this Article is less a critique of law and economics than a clarification of its appropriate scope. Furthermore, much of what goes under the name of law and economics need not, and does not, employ the concept of social efficiency at all. Indeed, there are some contexts in which law and economics entails nothing more than thinking clearly and carefully about the consequences of actions, including unintended or nonobvious consequences—a mission that is not only coherent and robust, but is a welcome contrast to the fuzzy-headed moralizing that so often passes for legal scholarship. My complaint is with careless or equivocal treatments of the concept of "efficiency," not with economic analysis of law in all of its varied manifestations.

I am hardly the first person to seek to clarify the meaning of "efficiency" in law and economics;[17] many of the arguments I advance are familiar, and even old hat, to law and economics scholars. But even the best analyses of law and economics tend to take methodological principles for granted, without serious philosophical scrutiny; to concentrate too heavily on the particular theories of Judge Posner rather than on the less sophisticated but more pernicious theories that *sub silentio* influence academic discussions; and, most significantly, to shrink from the full consequences of a consistent methodological individualism. My primary contribution to the law and economics debate is thus focus and consistency—or, as Judge Posner might term it, fanaticism.[18]

I. A BRIEF ESSAY ON ECONOMIC METHOD

Individualism can describe either a moral posture, a positive methodological approach, or both. In this Article, I use the term principally in the methodological sense, which holds that *the individual is the irreducible unit of positive economic analysis.* That

17. *See* DAVID D. FRIEDMAN, PRICE THEORY 347–56 (1986) (distinguishing different conceptions of efficiency); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 4–16 (1982) (same).

18. *Cf.* POSNER, ECONOMICS OF JUSTICE, *supra* note 12, at 97 (arguing that "only a fanatic" would require unanimity to legitimate a social institution); Posner, *supra* note 12, at 100 (describing adherence to a strict unanimity requirement as "fanaticism").

principle and certain of its most important implications require careful examination.

A. *The Primacy of Methodological Individualism*

Human actions are always the actions of concrete individuals. Perhaps those actions are always influenced, or even conditioned, by the individual's location in a particular social group, and thus the study of human behavior in anything other than a social setting may be wholly uninteresting and unfruitful. It is nonetheless true that when one studies human behavior, one always studies the behavior of individual humans. There is simply nothing else to study: "[T]here are no such things as ends of or actions by 'groups,' 'collectives,' or 'States,' which do not take place as actions by various specific individuals."[19] When we speak of the action of a group, as we often do, we speak metaphorically. Nations do not in fact wage war, mobs do not riot, and gangs do not rape. Individuals do.

Methodological individualism[20] means nothing more than it says. It most emphatically is not a metaphysical claim about human autonomy, a psychological claim about the formation of preferences, or a normative celebration of separateness.[21] It is simply a positive statement about the appropriate, indeed the only possible, objects of social scientific study. It does not question the importance of social entities like nations, classes, and ideological groups. Indeed, "[m]ethodological individualism, far from contesting the significance of such collective wholes, considers it as one of its main tasks to describe and to analyze their becoming and their disappearing, their changing structures, and their opera-

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19. 1 MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES 2 (1962); *see also* LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMIES 42 (3d rev. ed., Henry Regnery Co. 1966) (1949) ("A collective operates always through the intermediary of one or several individuals whose actions are related to the collective as the secondary source.").

20. For additional descriptions of methodological individualism, see VON MISES, *supra* note 19, at 41–43, 143; LUDWIG VON MISES, THE ULTIMATE FOUNDATION OF ECONOMIC SCIENCE 80–82 (1962); Christopher T. Wonnell, *Contract Law and the Austrian School of Economics*, 54 FORDHAM L. REV. 507, 523 (1986).

21. *Cf.* Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1049–51 (1990) (describing Progressive-Era criticisms of neoclassical economics for treating preferences in isolation from their social context).

tion."[22] Methodological individualism is simply recognition of the fact that because the behavior of institutions is really the behavior of individuals in particular institutional settings, "[t]he only way to a cognition of collectives is the analysis of the conduct of its members."[23]

B. *The Primacy of Subjectivism*

Human action consists in individuals choosing, at each discrete instant in time, one of the myriad possibilities open to them. The rationality postulate of economics states (or assumes, or predicts) that each action of each individual will aim at achieving a more preferred state of affairs than the individual believes would result from other courses of action. Even a decision to take no overt action is an economic decision: The state of rest, with all of its consequences, is preferred to its available alternatives.[24]

Action thus always demonstrates a preference on the part of the actor.[25] We know that at the instant in time at which an action is taken, the chosen course is the actor's preferred course: The actor expects to gain utility from substituting a more desired state of affairs for a less desired one. (That expectation, of course, may be disappointed if the actor's beliefs about the various possible states of affairs turn out to be mistaken.) But can we—or the actor—say anything useful about the *level* of utility that results from action? In particular, can we make judgments that *compare*

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22. VON MISES, *supra* note 19, at 42.

23. VON MISES, *supra* note 20, at 81.

24. An alternative is "available" to a particular actor only if that actor is aware of it. At the relevant moment of action, lack of information is as much an obstacle to availability as the laws of physics. *See* Calabresi, *supra* note 10, at 1218–19.

25. In the absence of observable action, the nature, and even the bare existence, of preferences must be inferred. Such an inference, however, will often be well justified by the evidence, which notably includes our introspective knowledge of human behavior. Accordingly, I do not adhere to a strict requirement of "demonstrated preference," in which preferences are deemed cognizable only if logically entailed by an act of choice. Reliance on this kind of interpretive knowledge of human behavior, however, requires one to go beyond what many economists might regard as the proper domain of economic science. *Cf.* Murray N. Rothbard, *Praxeology, Value Judgments, and Public Policy*, *in* THE FOUNDATIONS OF MODERN AUSTRIAN ECONOMICS 89, 98–100 (Edwin G. Dolan ed., 1976) [hereinafter FOUNDATIONS] (insisting that self-described scientific economists must adopt a strong theory of demonstrated preference, even when they know "from interpretive understanding of . . . hearts and minds" that people sometimes have preferences that are not demonstrated by action).

the utility that *A* obtains from *X* with the utility that *B* obtains from *X* or *Y*?

The near-uniform answer of modern economists and legal scholars is "no," which they express by saying that *it is impossible to make interpersonal comparisons of utility*.[26] The standard argument for this proposition is seemingly straightforward. When we talk about a person's height or weight, we can do so in terms of interpersonally observable units of measurement such as feet or pounds. These units provide common numerical standards that we can use to compare the properties of various objects or to track changes in our own height or weight over time. But there is no such unit of measurement for utility that enables us to say that someone (including ourselves) derived *N* amount of utility from an action. Accordingly, there is no common scale, external to *A* and

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26. *See, e.g.*, JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 59 (1976) ("Economists today generally believe that summation of the utilities of different people is meaningless . . . ."); POSNER, ECONOMICS OF JUSTICE, *supra* note 12, at 79 ("The 'interpersonal comparison of utilities' is anathema to the modern economist, and rightly so, because there is no metric for making such a comparison."); Joseph M. Dodge, Zarin v. Commissioner: *Musings About Debt Cancellations and "Consumption" in an Income Tax Base*, 45 TAX L. REV. 677, 688 (1990) ("[I]nterpersonal comparisons of subjective utility are not possible."); Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 48 n.140 (1989) ("Of course, interpersonal comparisons of utility are generally impossible . . . ."); Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 859 (1988) ("Most commentators, especially economists, argue that one cannot make . . . interpersonal utility comparisons."); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 228 n.28 (1986) (noting "the impossibility of making interpersonal comparisons of utility"); Ian Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 999, 1005 (1987) (noting the consensus against interpersonal utility comparisons); Luize E. Zubrow, *Is Loan Forgiveness Divine? Another View*, 59 GEO. WASH. L. REV. 451, 504 n.169 (1991) ("[I]t is impossible to measure an individual's utility, to make interpersonal comparisons of utility, or to aggregate utility."). For an excellent critical history of the emergence of this consensus among modern economists, see Hovenkamp, *supra* note 21, at 1033–51.

Not all economists subscribe to the conventional wisdom. *See, e.g.*, AMARTYA SEN, *Interpersonal Comparisons of Welfare*, *in* CHOICE, WELFARE AND MEASUREMENT 264 (1982); John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 319–21 (1955). Among legal scholars, dissenters include persons as diverse as Richard Epstein and Robin West. *See* Richard A. Epstein, *Rights and Rights Talk*, 105 HARV. L. REV. 1106, 1118 (1992) (reviewing MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991)); Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 683–85 (1990); *see also* David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1843 (1991) (describing the refusal to acknowledge the legitimacy of interpersonal utility comparisons as a "taboo").

B, on which *A*'s and *B*'s utilities can be placed, and the utility *A* obtains from choosing or experiencing *X* and the utility *B* obtains from choosing or experiencing *X* or *Y* thus cannot scientifically be added, subtracted, compared, or contrasted.

This argument's conclusion is fundamentally correct: Interpersonal comparisons of utility of the form described above are indeed rationally inadmissible. But the road to that conclusion is not as smooth as this argument suggests: The argument's premises are not self-evident, and the conclusion itself is ambiguous.

Economists who deny that utility is interpersonally comparable can mean either of two very different things. First, they might simply doubt our present measurement abilities. One such argument might assume that there is some correlation between, for example, utility and observable brain states, such that a sufficiently sensitive "brain-o-meter" could detect these physiological responses and thereby provide a scale of measurement, but maintain that we do not presently know what to measure or how to take such measurements.[27] This argument might conclude that at a minimum it is incumbent upon anyone who wants to make objective statements about utility to specify the scale of measurement involved and the method by which measurements are taken.

This argument is not, by itself, decisive against the permissibility of interpersonal utility comparisons.[28] Measurement problems can only be deemed insuperable if we independently know that interpersonal utility judgments are impossible or meaningless. If interpersonal judgments are possible in principle, we have good reason to believe that many of our present judgments are correct, at least in extreme cases (involving, for example, *A*'s avoiding death by torture versus *B*'s avoiding a hangnail). Our widespread agreement about relative intensities of preference in such extreme cases is at least as impressive as our widespread agreement about, for example, the relative lengths of temporal intervals in the absence of precise measuring devices. The fact that we can disagree about the extent of temporal intervals in closer cases does not mean that there is no "real" phenomenon to be objectively, interpersonally measured.[29]

27. *See, e.g.*, Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 516–17 (1983).

28. I am indebted to David Friedman for persuading me in conversation of this point.

29. *Cf.* Milton Friedman & L.J. Savage, *The Expected-Utility Hypothesis and the*

Thus, if there is a fundamental problem with interpersonal utility comparisons, it must stem from a second, and stronger, argument that denies that interpersonal comparison of utility is even a meaningful concept. According to this position, it is not *false* or *unknowable* to say that *A*'s utility is "greater than," "less than," or "equal to" *B*'s utility; rather, it is a *category mistake*: the application of a predicate to a subject in a manner that is meaningless or absurd.[30] This view maintains that talking about interpersonal comparisons of utility simply does not make sense, just as it does not make sense to talk about a happy rock or a greenish shade of cold. Thus, it is not a question of waiting for someone to invent the right tools and units of measurement and comparison; but rather, the measuring and comparing enterprise is ill-conceived from the outset.

Anyone who seeks to explain and defend this latter position, as I do here, must deal with the obvious fact that we can and do make interpersonal comparisons of various sorts all the time, and with no apparent sense of anomaly. As many scholars have observed, statements such as "it means more to you than it does to me" are common expressions that we all understand.[31] Surely everyone would agree, for example, that long-suffering victims of communism have received greater utility than I from recent events in Eastern Europe. It seems just silly to doubt that their utility is "greater" than mine, that the utility a starving person would re-

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Measurability of Utility, 60 J. POL. ECON. 463, 471–74 (1952) (similarly arguing that utility is just as "measurable" as length and temperature).

30. *See generally* A.C. Baier, *Nonsense*, *in* 5 THE ENCYCLOPEDIA OF PHILOSOPHY 520, 520–21 (Paul Edwards ed., 1967) (discussing category mistakes). For example, the statement "all rocks are chartreuse" is false, but it is not absurd; all rocks at least possess the property of color, even if they do not all exhibit that particular color. In the case of a statement like "all rocks are happy," however, declaring it false seems inadequate ("if all rocks aren't happy, which ones are sad or nonchalant?"). Emotional states simply are not the sorts of predicates that can be applied to rocks.

31. *See, e.g.*, K.J. Arrow, *Values and Collective Decision-Making*, *in* ECONOMIC JUSTICE 117, 135 (Edmund S. Phelps ed., 1973); Donald Davidson, *Judging Interpersonal Interests*, *in* FOUNDATIONS OF SOCIAL CHOICE THEORY 195, 195 (Jon Elster & Aanund Hylland eds., 1986); Epstein, *supra* note 26, at 1118; Kent Greenawalt, *Promise, Benefit, and Need: Ties that Bind Us to the Law*, 18 GA. L. REV. 727, 751–52 (1984); James Griffin, *Against the Taste Model*, *in* INTERPERSONAL COMPARISONS OF WELL-BEING 45, 65 (Jon Elster & John E. Roemer eds., 1991) [hereinafter INTERPERSONAL COMPARISONS]; Harsanyi, *supra* note 26, at 316–17; Aanund Hylland, *Subjective Interpersonal Comparison*, *in* INTERPERSONAL COMPARISONS, *supra*, at 337, 338–39; West, *supra* note 26, at 683–85.

ceive from finally getting a decent meal is "greater" than the utility I would receive from having steak tonight rather than fettucine, or that the utility of the average person in the United States is "greater" than that of the average person in Cuba.

Statements of this kind are in fact meaningful and informative. There may, however, be either more or less to their meaning than meets the eye, and we must accordingly think very carefully about what we can plausibly say about "utility" and how we must say it. As is true of "efficiency," "utility" is a highly equivocal term.[32] Before one can decide whether, and under what circumstances, interpersonal utility comparisons are possible or meaningful, one must first specify what is meant by "utility." The meaningfulness of measurements and comparisons of utility depends heavily on what is being measured and compared.[33] In particular, one must distinguish carefully between conceptions of utility that refer to *welfare* and conceptions that refer to *satisfaction.*

If utility means *welfare*, the inquiry shifts to the appropriate meaning of welfare. There are innumerable meanings of welfare (and hence of utility defined as welfare) that render interpersonal comparisons, of either a normative or positive variety, entirely unproblematic from a methodological perspective.

Almost no one denies that a *normative* interpersonal welfare comparison between *A* and *B* can be meaningful, as long as the underlying conception of welfare is meaningful.[34] If some moral theory ranks *A*'s having *X* over *B*'s having *X* or *Y*, one can freely say that the first outcome enhances social welfare more, and hence generates more utility, than does the second—provided only that

32. *See* AMARTYA SEN, ON ETHICS AND ECONOMICS 40 n.13 (1987) ("Utilities can, of course, be defined in many different ways . . . ."); Griffin, *supra* note 31, at 48 ("'Utility' is a technical term and so needs stipulation (but seldom gets much)."); Daniel Kahneman & Carol Varey, *Notes on the Psychology of Utility*, *in* INTERPERSONAL COMPARISONS, *supra* note 31, at 127, 127-29 (discussing different conceptions of utility).

33. *Cf.* Griffin, *supra* note 31, at 52 ("Just how big a problem interpersonal comparisons of utility present varies with the conception of utility in use. With some conceptions the problem is slight; with others it is great.").

34. Indeed, the most famous modern objection to interpersonal utility comparisons—that of Lionel Robbins, *see infra* note 83 and accompanying text—argued precisely that such comparisons were normative, and hence outside the boundaries of scientific economics. *See* SEN, *supra* note 26, at 265. Persons who doubt the meaningfulness or coherence of all normative discourse will of course object to such normative welfare comparisons, but that objection does not concern me here.

the operative moral theory is coherent. But if economists or legal scholars want to use the term "utility" in this fashion (which essentially treats "welfare" or "utility" simply as a label to describe the conclusions of normative theorizing), it is incumbent upon them to specify the relevant moral theory and, if they mean to do more than merely describe its operation in hypothetical form, to give the theory a rational grounding.[35]

Positive interpersonal welfare comparisons between *A* and *B* can also be meaningful if the underlying conception of welfare is coherent. For example, one can make good judgments about the relative effects of some action on the welfare, and hence utility, of *A* and *B*, if one measures welfare by expected lifespan. Similarly, one can define welfare, and hence utility, in terms of money income, caloric intake, frequency of smiles or frowns, or some index of such factors. All such definitions allow interpersonal comparisons to be made with varying degrees of precision.[36] Any scholar who uses "utility" to refer to such a conception of welfare need only specify that conception and assure that it is coherent.

Although I cannot prove it, I do not believe that any such welfare-based usages of "utility" are standard among law and economics scholars (though the same may or may not be true of economists as a whole). The focus of law and economics seems to be the *satisfaction of preferences* rather than objectified measures of welfare or well-being.[37] When law and economics scholars speak of a person's utility, they appear to mean, in one form or another, the person's *satisfaction* or *happiness*.[38] To understand

35. Economists and legal scholars engaged in positive theorizing will by definition eschew this approach. Scholars pursuing normative utility theory in this fashion may or may not face problems of coherence (depending upon their chosen normative theories), but they will certainly have a difficult time explaining why anyone should pay attention to them. If I may be permitted the indulgence of self-quotation: "It is conceivable that the ethical, epistemological, and metaphysical problems of the ages will be solved by an article in a twentieth-century, English-language law journal. But I rather doubt it." Lawson, *supra* note 16, at 778.

36. The degree of precision affects the usefulness of a conception of welfare, but not its coherence. It may be possible, under some conceptions of welfare, to make gross comparative judgments among persons without being able to resolve all hard cases. *See* AMARTYA SEN, *Interpersonal Aggregation and Partial Comparability*, *in* CHOICE, WELFARE AND MEASUREMENT, *supra* note 26, at 203, 205–06.

37. For an illuminating discussion of the uneasy relationship between welfare and preference satisfaction, see generally Allan Gibbard, *Interpersonal Comparisons: Preference, Good, and the Intrinsic Reward of a Life*, *in* FOUNDATIONS OF SOCIAL CHOICE THEORY, *supra* note 31, at 165.

38. *See, e.g.*, FRIEDMAN, *supra* note 17, at 58 ("The idea of utility grows out of the

the meaning of utility, then, one must first understand the meaning of satisfaction.

If satisfaction is defined in the same way as welfare, perhaps by reference to objective physical manifestations like facial gestures,[39] no problems of coherence are raised: It is certainly possible to compare in any number of ways *A*'s facial gestures (or other behaviors) to *B*'s. But I doubt whether that objective conception of satisfaction is what most law and economics scholars, or most people, have in mind when they talk about utility-as-satisfaction. The more prevalent notion of satisfaction undoubtedly refers to some internal psychic event or feeling; in ordinary discourse, satisfaction or utility is a *state of mind*.[40] The relevant psychic feeling can be characterized in many different ways: hedonic pleasure,[41] pleasure of a certain quality,[42] or eudaimonia;[43] one can meaningfully define utility in any of these terms.[44]

Once utility is understood to mean satisfaction in some such experiential sense,[45] the problem of interpersonal comparability rears its head. Satisfaction just *is*, metaphysically, something that is

attempt to understand all of an individual's choices in terms of a single thing he is trying to maximize—happiness, pleasure, or something similar. We call this his *utility*."). I am willing to be told that I have totally misunderstood the sense in which law and economics scholars use the concept of utility. Indeed, my principal purpose here is to "smoke out" the meanings that law and economics scholars attribute to their central concepts.

39. *See generally* SEN, *supra* note 26, at 265–67 (describing such "behaviourist" approaches).

40. One can also use "satisfaction" to describe the realization of preferences rather than the mental state that results from their realization. *See* SEN, *supra* note 32, at 45–46; Gibbard, *supra* note 37, at 168–69; Kahneman & Varey, *supra* note 32, at 128; Thomas M. Scanlon, *The Moral Basis of Interpersonal Comparisons*, *in* INTERPERSONAL COMPARISONS, *supra* note 31, at 17, 24. But utility seems to describe more the consequences of preference satisfaction than the bare act of preference satisfaction. Furthermore, unless one simply counts all preferences equally, there must be some basis for distinguishing the realization of different preferences, and it is hard to see what that basis would be if not the psychic effects on the actor.

41. *See* Kahneman & Varey, *supra* note 32, at 127–28.

42. *See* JOHN S. MILL, UTILITARIANISM 9–14 (E.P. Dutton 1951) (1863).

43. Eudaimonia is "the condition of living in harmony with one's daimon or innate potentiality, 'living in truth to oneself.' It is marked by a distinctive feeling that constitutes its intrinsic reward and therefore bears the same name as the condition itself." DAVID L. NORTON, PERSONAL DESTINIES: A PHILOSOPHY OF ETHICAL INDIVIDUALISM 216 (1976).

44. Perhaps, as Mill claimed, it is "better to be Socrates dissatisfied than a fool satisfied," but the fool's state of mind is nonetheless real. MILL, *supra* note 42, at 12.

45. I have borrowed the term "experiential" from Professor Scanlon. *See* Scanlon, *supra* note 40, at 20.

unique to an experiencing, acting individual. We can all experience satisfaction, but we cannot experience each other's satisfaction. Even if satisfaction were somehow correlated with physical brain states, we could not "measure" satisfaction by measuring the brain states. Satisfaction is an experiential state, not the physiological manifestation of that experiential state. One can no more measure satisfaction by reference to physiological phenomena than one can measure it by reference to money.

Experientialists, of course, must account for our evident ability to make interpersonal judgments of the form, "it means more to you than it does to me,"[46] which seems plainly to contemplate interpersonal comparisons of the intensity of psychic states. The standard answer, which I endorse, relies upon what Kenneth Arrow has called *extended sympathy*,[47] which "reduce[s] interpersonal comparisons to less problematic intrapersonal ones, by appeal to a judge's own preference as to possible states of himself."[48] We all seem able to make personal judgments about the intensity of our own satisfaction, to the effect that we prefer *W* to *X* "more" than we prefer *Y* to *Z*. This implies that we all have an internal "psychic scale" by which we can in some sense measure our own satisfaction, at least in terms of "greater" or "lesser" intensity.[49] Furthermore, we have imagination and memory. Therefore, a subjectivist would interpret a judgment that, for example, a starving person's meal generates more satisfaction than our own consumption of a favorite main course to mean that the satisfaction that each of us believes we would experience when in the position of the starving person would rank higher on our internal scales—be more intense than—the satisfaction from presently choosing a marginally superior dinner. It is a judgment, or rather

46. *See supra* note 31 and accompanying text.

47. Kenneth J. Arrow, *Extended Sympathy and the Possibility of Social Choice*, 67 AM. ECON. REV. 219 (1977).

48. Griffin, *supra* note 31, at 52. For an illuminating discussion of how this procedure can be applied to a wide range of judgments, see R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 117–29 (1981).

49. It does not matter for the present argument whether these personal judgments are cardinal or ordinal. I do not have the background to understand the intricacies of the von Neumann-Morgenstern Index, which purports to provide a cardinal measurement for personal utility, but it is evidently well accepted that von Neumann-Morgenstern measurements do not provide a basis for interpersonal comparisons. *See* P.K. Pattanaik, *Risk, Impersonality and the Social Welfare Function*, *in* ECONOMIC JUSTICE, *supra* note 31, at 298, 316; Letter from David D. Friedman to Gary Lawson (May 29, 1992).

a guess or prediction, about *our own* experiences, and thus requires no direct comparison of our satisfaction with anyone else's. Of course, if virtually every person we know would make the same judgment, that tells us something interesting and useful about human satisfaction—namely, that other people's experiential capacities are in some respects similar to our own. But that *structural* similarity in capacities seems to be the only sense in which satisfactions can be compared or contrasted across persons, and it simply does not bridge the gap between my experience and yours. I can imagine myself having different preferences than you do; and to the extent that I can infer your preference-orderings from your actions and words, perhaps I can even to some extent imagine myself having "your" preferences (though the very act of imagining them as my preferences transforms them). But the *experience* that I imagine from satisfying your-preferences-if-they-were-mine is inescapably my own experience. Experience is metaphysically subjective, and thus incommensurable across persons.[50] The statement "It is more important to you that X than it is to me that Y" is coherent only if it is translated to mean, "It would be more important to me that X if I had a certain, different set of preferences (which I believe that you have) than it is to me that Y, given my existing preferences." If the statement is intended as a direct comparison between my experience and yours, it is incoherent.

Although I suspect that most law and economics scholars would agree with most of what I have said thus far about economic methodology, the subjectivist position is not without critics. Professor Hovenkamp, for example, protests that the subjectivist criticism of interpersonal comparisons of utility[51] proves too much: If the subjective nature of our experience of satisfaction prevents us from making interpersonal comparisons, it must also prevent us from knowing that other people are conscious at all, as we have no direct access to other minds but must infer their existence and contents from external manifestations.[52] But then if we are willing

50. *Cf.* SEN, *supra* note 32, at 47 n.17 (doubting "the understandability and relevance" of "hypothetical choices regarding becoming one person or another").

51. Professor Hovenkamp uses the term "well-being" to describe an experiential conception of utility. *See* Hovenkamp, *supra* note 15, at 69 ("I therefore use the term 'well-being' to refer to some quantity, perhaps not even empirically measurable, related to how happy or satisfied people feel.").

52. *See* Hovenkamp, *supra* note 21, at 1039–41; *see also* Gibbard, *supra* note 37, at

to infer that other people experience the world in ways that we can identify as "consciousness," why not also infer that we experience satisfaction on a common scale that at least permits us to make interpersonal judgments of intensity in extreme cases in terms of "greater" or "lesser" intensity?

The reason is that the evidence supports the first inference but not the second. The inferential evidence for the existence of other minds and for the structural similarity of human perceptions is simply overwhelming. By the same token, the evidence for other people's ability to experience satisfaction and for structural similarities in that faculty is also very powerful—by and large, we all seem to rate the (imagined) satisfaction from eating after long deprivation as more intense than the satisfaction from eating a marginally better meal in our present circumstances. But none of that provides a standard for comparison of satisfaction across persons. It tells us that the structure of the human mind and human experience displays many similarities, but it remains to be explained how that structural similarity can be translated into a metric for interpersonal comparisons. Just as we can say that our perceptions of reality are *similar* to those of other people, but cannot say that they are *identical*, we can say that our experiences of satisfaction are *similar* to those of other people, but cannot say that they are *identical*. But an assumption of identity is necessary to establish a common scale of measurement, even an ordinal one, and hence to make interpersonal comparisons coherent.

So why not make that assumption? If one is willing to grant that there are structural similarities in people's capacities to experience satisfaction, then why should one not also postulate the possibility of a unitary interpersonal scale that at least permits gross comparisons in extreme cases? Is there any more reason to doubt the existence of such an underlying, albeit presently unspecifiable, scale than to assume it?

Perhaps not. If satisfaction just *is*, metaphysically, the sort of thing that cannot be compared across persons, as I maintain, then I am correct to refrain from making that final assumption; on the other hand, if it *is not*, then I am wrong. There is no obvious way to choose between these hypotheses about the metaphysical nature

183 (agreeing that skepticism about interpersonal comparisons can lead to questions about the very existence of others).

of satisfaction. They are both consistent with all the evidence we have, and they both generate rational world-views. How does one pick sides?

The choice must ultimately rest on a basic epistemological principle: The burden of proof lies with he who asserts the existence of an entity.[53] An interpersonal utility scale is a metaphysical existent, and the burden of proof thus lies with the proponents of such a scale. If the evidence is equally balanced between its existence and nonexistence, one must opt for nonexistence, and the nonexistence of such a scale destroys the meaningfulness of direct interpersonal comparisons. I may be wrong to suppose that the evidence is equally balanced,[54] but until convinced that it is not, I must assume that interpersonal comparisons of utility (where utility is understood as experiential satisfaction) are rationally inadmissible.

As I have suggested, and as we shall see in Part II, most of the efforts of law and economics scholars to devise a useful conception of "economic efficiency" are attempts to accommodate or circumvent, rather than deny, the subjectivity of economic value. The full consequences of economic subjectivism, however, have been recognized only by a handful of economists associated with the so-called Austrian school of economics;[55] and then, even most

53. A full justification of this crucial principle would require a separate article, which I hope someday to provide. The basic insight is that existence always has affirmative consequences, while nonexistence does not. The best, or even the only possible, evidence for the nonexistence of X is often (though not always) the absence of positive evidence for the existence of X. Thus, the absence of evidence for X rationally supports disbelief in its existence and warrants a general assignment of the burden of proof to those who assert the existence of an entity. *See generally* LEONARD PEIKOFF, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND 167–68 (1991) (elaborating on the rule that "the onus of proof is on him who asserts the positive"); Dale Lugenbehl, *The Argument for an Objective Standard of Value*, 55 PERSONALIST 155, 156–59 (1974) (outlining the Objectivists' argument that the person claiming that something is possible bears the burden of proving its existence).

54. David Friedman and Mike Rappaport have both suggested in conversation, for example, that there are good evolutionary reasons to believe that interpersonal comparisons are possible, as the ability to make such comparisons would have positive survival value. I have not given this argument the consideration that it deserves; if it is sound, it might well change my view. My preliminary thoughts, however, are that our ability to imagine ourselves having different preferences and the structural similarities in our capacities for satisfaction are enough to satisfy these evolutionary concerns, as they fully account for the useful interpersonal judgments that we make in everyday life.

55. The Austrian school of economics generally traces its origins to the work of Carl Menger in the last quarter of the nineteenth century, *see* LUDWIG M. LACHMANN,

Austrians pull up short of the gate, notwithstanding the bold assertion of Austrian giant Friedrich Hayek that "every important advance in economic theory during the last hundred years was a further step in the consistent application of subjectivism."[56] As usual, Hayek was right. In particular, subjectivism has some oft-overlooked consequences for the definition of an economic good that must be kept in mind by law and economics scholars.

C. *Subjectivism and Economic Goods*

Every beginning economics student learns the *law of diminishing marginal utility*, which states that each additional, or marginal, unit of a good will be less highly valued by an actor than previous units.[57] The law follows directly from the rationality postu-

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The Significance of the Austrian School of Economics in the History of Ideas, *in* CAPITAL, EXPECTATIONS, AND THE MARKET PROCESS 45, 45 (1977), though some essential concepts were evident in Scholastic thinking as early as the 1500s, *see* Murray N. Rothbard, *New Light on the Prehistory of the Austrian School*, *in* FOUNDATIONS, *supra* note 25, at 52, 54–58. Although "no two Austrians have ever completely agreed on methodology," STEPHEN C. LITTLECHILD, THE FALLACY OF THE MIXED ECONOMY 16 (1979), few would seriously quarrel with Israel Kirzner's summary description of Austrianism:

> Austrian economists are subjectivists; they emphasize the purposefulness of human action; they are unhappy with constructions that emphasize equilibrium to the exclusion of market processes; they are deeply suspicious of attempts to apply measurement procedures to economics; they are skeptical of empirical "proofs" of economic theorems and consequently have serious reservations about the validity and importance of a good deal of the empirical work being carried on in the economics profession today.

Israel M. Kirzner, *On the Method of Austrian Economics*, *in* FOUNDATIONS, *supra* note 25, at 40, 40. The full flavor of Austrian methodology can be appreciated only by reading the two principal treatises on Austrianism, *see* VON MISES, *supra* note 19; ROTHBARD, *supra* note 19, but shorter and more serviceable methodological statements are available, *see* LAWRENCE H. WHITE, METHODOLOGY OF THE AUSTRIAN SCHOOL (Center for Libertarian Studies Occasional Paper Series No. 1, 1977); Murray N. Rothbard, *Praxeology: The Methodology of Austrian Economics*, *in* FOUNDATIONS, *supra* note 25, at 19. For an ingenious critique of Austrian methodology by a noted philosopher, and a response by a noted Austrian, see Robert Nozick, *On Austrian Methodology*, 36 SYNTHESE 353 (1977); Walter Block, *On Robert Nozick's 'On Austrian Methodology'*, 23 INQUIRY 397 (1980).

56. FRIEDRICH A. HAYEK, THE COUNTER-REVOLUTION OF SCIENCE 51 (1952). There is a rich and extensive Austrian literature on the nature and implications of subjectivism. *See id.* at 41–60; VON MISES, *supra* note 19, at 97–98, 119–23; ROTHBARD, *supra* note 19, at 256–66; Stephan Boehm, *The Ambiguous Notion of Subjectivism: Comment on Lachmann*, *in* METHOD, PROCESS, AND AUSTRIAN ECONOMICS 41 (Israel M. Kirzner ed., 1982); Ludwig M. Lachmann, *Ludwig von Mises and the Extension of Subjectivism*, *in* METHOD, PROCESS, AND AUSTRIAN ECONOMICS, *supra*, at 31.

57. *See generally* HIRSHLEIFER, *supra* note 26, at 60–62; VON MISES, *supra* note 19, at 119–25 (describing the manner in which man values things in society); ROTHBARD, *supra* note 19, at 17–28.

late of economics: Previous units of the good will presumably go to satisfy the actor's most urgent wants, meaning that an additional unit will have to satisfy relatively less urgent wants, and thus be less highly valued.[58] Few principles of economics are as simple or important, and few have been as thoroughly misunderstood for so long.

There are at least two critical limitations on application of the law of diminishing marginal utility. First, and most obviously, the law applies only to a single actor. For the reasons discussed in the previous section, it does not permit utility comparisons across persons. One cannot, for example, use the law of diminishing marginal utility to argue that a rich man's millionth dollar is "less highly valued" than a poor woman's first dollar, as that assumes a common scale of satisfaction for the two people.[59] I cannot convey how many times I have heard the principle misused in this fashion in casual conversations or classroom discussions, even by people who would acknowledge their error in more careful moments.

Second, and more important for our purposes, the law of diminishing marginal utility as a necessary economic truth holds only for units of supply of the same good. The rationality postulate tells us that, at a given instant in time, an actor will put existing unit *X* to the highest-valued use that she believes can be served by a unit of the good to which *X* belongs. We can logically conclude that additional item *Y* will be put to a lower-valued use than *X* only if *Y* is a unit of supply of the same good as *X*. If *Y* is a unit of a different good, it is a contingent matter whether it will serve a higher- or lower-valued end than *X*; one cannot in that case employ the law of diminishing marginal utility to conclude *necessarily* that the end (and hence the means) will be lower-valued.

58. *See* ROTHBARD, *supra* note 19, at 20–23.

59. *See id.* at 260. The cited passage incidentally demonstrates the difficulty of maintaining a consistent subjectivist posture. Professor Rothbard correctly observes that because the law of diminishing marginal utility applies only to individual persons, one cannot claim "that an extra dollar is enjoyed less by a Rockefeller than by a poor man." *Id.* He then adds as a reason for this conclusion, however, that "[i]t is certainly possible that a Rockefeller enjoys the services of each dollar more than a poor, but highly ascetic, individual does." *Id.* It is not possible; it is incoherent. It would be possible only if utilities could be compared across persons, which Professor Rothbard adamantly maintains is impossible—in the very paragraph in which this statement appears! *See id.*

The price of fanaticism is eternal vigilance.

Thus, the concept of homogeneous units of supply of the same good is fundamental to the law of diminishing marginal utility—and indeed to all of economics. The adjective "homogeneous" is particularly critical. Two objects are units of supply of the same good, and hence subject to the law of diminishing marginal utility, only if they are *"interchangeable from the point of view of the actor."*[60] If the actor does not view the objects as equally serviceable for the actor's ends, they are simply not units of supply of the same good, regardless of their physical properties.

This means that only an individual, concrete actor can define what, for her, constitutes the same good. Two objects with identical molecular structures, trivially differing only in their location in space-time, are not necessarily units of supply of the same good. They are so only if a particular actor chooses to treat them as such. Thus, if an actor views an elephant and a martini as equally serviceable for his ends, the elephant and martini are, for that actor at that instant, units of supply of the same good. Conversely, if an actor does not view the objects as equally serviceable for her ends, the objects simply are not units of supply of the same good. The definition of an economic good is thus radically subjective. One cannot speak of an economic "good" without asking the question, "a good to whom?" Without reference to a concrete actor's actual preferences and values, the concept of an economic good is literally meaningless.[61]

The subjective nature of economic goods has important consequences. First, one cannot assume that units of money are necessarily units of supply of the same good for any given actor. Indeed, there is often good reason to assume the contrary. Suppose that *A* has one dollar. He perceives that the dollar can be used to satisfy any one of a specific set of wants, and he uses the dollar to satisfy the most urgent of those wants. Now suppose that *A* has his original dollar and then acquires a second dollar. If *A* views that second dollar as being capable of satisfying the same

60. *Id.* at 18–19; *see also id.* at 19 ("When a commodity is in such a way available in *specific homogeneous units equally capable of rendering the same service to the actor,* this available stock is called a *supply.* A *supply of a good* is available in specific units each perfectly substitutable for every other.").

61. Many Austrians have pointed out the subjective character of the concept of an economic good, but they seldom make explicit the obvious conclusion: Nonsubjectivist talk about goods is literal nonsense. *See* HAYEK, *supra* note 56, at 53; ROTHBARD, *supra* note 19, at 590–91, 616–17; Wonnell, *supra* note 20, at 520 n.78.

set of wants as the first dollar, then the two dollars are, for *A*, units of supply of the same good. The law of diminishing marginal utility thus applies, and the second dollar will be used to satisfy a less urgent want than the first dollar.

Suppose, however, that *A* views the second dollar not merely as capable of satisfying the same set of wants as the first dollar, but also as expanding the range of wants that *A* is capable of satisfying. In other words, he can now either satisfy two sets of wants rather than one, *or choose to satisfy wants that cost between one and two dollars*, which he could not do before. Hence, on these assumptions, the second dollar is not equally serviceable with the first. The second dollar can do everything that the first dollar can do, and more besides. The two dollars are therefore *not units of supply of the same good.* It may even be that *A* values the second dollar *more highly* than he values the first dollar—perhaps because he values some of the more-than-one-dollar wants more highly than any two of the one-dollar-or-less wants. This circumstance would not violate the law of diminishing marginal utility, because the two dollars are then not units of supply of the same good. Similarly, it may well be that *A*'s millionth dollar is not in fact valued less highly than his 999,999th (or in theory even his first). The millionth dollar may expand the range of ends available to *A*, and thus constitute a different good than the previous dollars.[62]

A second, more dramatic consequence of the subjective nature of economic goods is that interpersonal comparisons of goods are no more permissible than interpersonal comparisons of utility. Suppose we want to claim that *A* and *B* both view particular items—such as two apples—as units of supply of the same good. That means that *A* and *B* view the apples as equally serviceable for their ends. But the judgment of serviceability is an economic value judgment, which is necessarily subjective for each actor. It is therefore incoherent to say that *A* and *B* view the apples as "equally" serviceable, as that assumes that one can compare on a common scale the economic valuations of *A* and *B* (and pronounce them equal). *A* and *B* might each separately view the apples as units of supply of a single good, but then all that one can say is that the apples are units of a good for *A* and units of a

62. *See* ROTHBARD, *supra* note 19, at 64, 268–71.

good for *B*. One cannot aggregate the underlying preferences to say that those goods are really the "same" good for both *A* and *B*. In economics, one cannot add apples and apples across persons any more than one can add apples and oranges.

I leave it to welfare economists to figure out how much of welfare economics can survive a subjectivist conception of economic goods.

II. THE ELUSIVE SEARCH FOR SOCIAL EFFICIENCY

The concept of *social efficiency* is central to law and economics in virtually all of its manifestations.[63] The normative branch of law and economics instructs decisionmakers to use social efficiency as a guide, even if not the sole guide, to conduct. The positive branch of law and economics will often describe outcomes as socially efficient or inefficient, without thereby passing judgment on their desirability. If the concept of social efficiency is incoherent or empty—that is, if efficiency in a social context does not refer to an intelligible or real phenomenon—all of these descriptive and normative law and economics enterprises become deeply problematic.

It is easy to see why descriptions that employ incoherent or empty concepts are rationally inadmissible. If one of the essential terms of a description is incoherent, the statement no longer functions as a description because it does not make the described event intelligible to a reasoning mind. Statements like "the result of policy *X* will be gleek" or "the result of policy *X* will be a greenish shade of cold" have no place in rational discourse. Accordingly, if "socially efficient" is a term like "gleek" or "greenish shade of cold," it cannot be used as part of a description. If the description instead employs a coherent but empty concept of efficiency, it suffers from the equally disabling problem of being necessarily false in all real-world applications. If social efficiency does not refer to any actual state of affairs, then a statement of the form "*X* is socially efficient" simply describes nothing real, and is thus not much of a description.

Predictive models, however, can and often do employ empty concepts with great efficacy. Concepts like the square root of negative one[64] are of enormous practical utility, and one can use

63. *See* COLEMAN, *supra* note 6, at 68.

64. Perhaps this concept should be deemed incoherent rather than empty. I do not

them to build internally consistent models that generate valuable predictions about the physical world. Similarly, economic models might have enough internal consistency to generate useful predictions even if the concepts they employ have no real-world referents.[65] Accordingly, someone who uses a concept of social efficiency only to generate predictions will be largely uninterested in the present critique, as long as the model's predictions prove fruitful.[66] The only caveat is that the events predicted by the model must be definable independently of the model. That is, there is no definitive objection to the use of a predictive model that employs an empty concept of efficiency, but the model's predictions cannot themselves be *couched* in terms of empty concepts of efficiency. A useful prediction of the form "the plaintiff will win" can emerge from such a model, but a prediction of the form "socially efficient outcomes will result" cannot, unless one can give a usable account of social efficiency.

It may seem obvious that a normative model cannot properly make use of incoherent or empty concepts. To evaluate actions by reference to an incoherent or nonexistent standard borders on a definition of psychosis. That is so, however, only if the purpose of normative theorizing is to yield true normative propositions. If normative theorizing is more like prediction than description, empty concepts might have a role to play. Suppose, for instance, that you have a moral theory consisting of a set of substantive normative propositions and a method for generating implications from that propositional set. If an economic model that employs a concept with no actual referent somehow generates good predictions about the results of application of your moral theory, and if the model is considerably easier to use in a range of applications than the theory itself, you might reasonably use the economic model to predict the result that you would be likely to reach by

pursue the point, because if my arguments are sound with respect to empty concepts, they are sound *a fortiori* with respect to incoherent ones.

65. *See, e.g.*, Jeffrey E. Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447, 1476–77 (1991) (noting that one can have a predictive model of legal decisionmaking based on assumptions that courts and juries try to make interpersonal utility comparisons even if the actors' beliefs do not make sense).

66. Of course, if a predictive model also specifies a plausible (and thus coherent) explanation for the predicted events, one will have more confidence in the predictions. *See* David E. Van Zandt, *The Relevance of Social Theory to Legal Theory*, 83 NW. U. L. REV. 10, 29–30 (1989). But a predictive model can be fruitful even if one does not know why it predicts accurately.

directly applying your moral theory. The model then serves not as a substantive source of moral truth, but as a proxy for your real moral theory, which you will have chosen independently of the economic model. I have long interpreted (perhaps incorrectly) Judge Posner's moral theory of social wealth maximization in precisely this fashion. Judge Posner believes that moral knowledge can ultimately be grounded only in deeply held intuitions.[67] A moral theory of wealth maximization, or of anything else for that matter, cannot in his view supplant intuitions or ground them in anything more fundamental, but can help to systematize intuitions into a form that makes them more readily applicable to concrete questions. As he put it in 1979, "what is desired in an ethical theory . . . is not a basis for abandoning those fundamental ethical precepts that all of us accept, if not always obey, but rather a structure which organizes our intuitions and provides guidance in dealing with ethical issues where our intuitions are uncertain."[68] As I have just described, an economic model can serve these functions even if it is empty, provided only that it is intelligible and internally consistent. Any normative law and economics theorist who is prepared to adopt this weak conception of moral reasoning can thus safely ignore my critique.

My guess is that most casual users of law and economics have somewhat grander ambitions for their normative efficiency judgments than I have just set forth. If so, then it is essential that the meaning(s) of social efficiency they have in mind be ascertained and closely examined, as every concept of social efficiency that is used in the modern law and economics literature is either incoherent, useless, or far enough removed from ordinary language to suggest that equivocation may lurk in the background. Nonpredictive normative or descriptive arguments that make use of these concepts offer the same risks. A systematic examination of each of the most commonly employed concepts of efficiency will therefore prove fruitful.

67. *See* POSNER, *supra* note 13, at 377.

68. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 111 (1979).

A. *Efficiency as Social Welfare Maximization*

In its most straightforward sense, efficiency refers to the ratio of outputs to inputs. To an engineer, a motor is efficient if it yields the highest achievable ratio of useful energy output to energy input. To an economist, an individual's actions are economically efficient if they use available inputs to maximize the present value of the individual's outputs, keeping in mind that saving an input for the future is an "output" and that there are many different ways of valuing outputs.[69] So why should we not further say that a society, social institution, or individual action is economically efficient if it uses available inputs to maximize the present value of *society's outputs*, keeping in mind the same two warnings? Indeed, law and economics scholars often make precisely such a move, deeming actions or institutions "efficient" to the extent that they increase or improve "social welfare." Accordingly, the first definition of efficiency to consider—a definition that can potentially serve both as a normative guide to conduct and as a way of describing events—is efficiency as the maximization of social welfare.[70] The related but somewhat different concept of social wealth maximization is examined later.[71]

1. *The Equivocal Meaning of Welfare.* The classic illustration of the social welfare definition of efficiency is the familiar economic case for the inefficiency of single-price monopolies.[72] The ideal for the welfare economist is the state of perfect competition, defined as a state "in which the individual buyer or seller does not influence the price by his purchases or sales."[73] Sellers

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69. Indeed, the efficiency of an actor's conduct need not even be measured by reference to the value of outputs as perceived by that actor. One could, for example, measure the efficiency of an actor's conduct by reference to the value of outputs as perceived by me.

70. Actually, the first definition to consider is efficiency as the maximization of individual welfare. This conception of efficiency is both coherent and nonempty, but I am aware of no law and economics scholar who makes significant descriptive or normative use of it. Accordingly, I confine my discussion to conceptions of social efficiency.

71. *See infra* notes 107–15 and accompanying text.

72. An eminently readable discussion of this issue is found in RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS 4–11 (2d ed. 1981).

73. GEORGE J. STIGLER, THE THEORY OF PRICE 87 (3d ed. 1966). The idea of perfect competition is a conceptual mess in its own right, but that is a subject for another day.

under perfect competition can sell their entire output at the market price, but no output at more than the market price. Hence, the revenue that sellers can gain from selling an additional, or marginal, unit is exactly equal to the market price. Sellers thus have an incentive as profit-maximizers to produce and sell all units of output whose price exceeds their marginal cost of production and sale. The marginal cost of an item, the theory continues, represents society's valuation of the worth of the relevant inputs in alternative uses, just as the item's price reflects society's valuation of the output. Thus, when an item's price equals its marginal cost, resources are being put to their socially optimal uses. Society is getting as much value out of the relevant inputs as it possibly can, as evidenced by the fact that no one can profitably bid those inputs away from their current uses.

Suppose, however, that one of these sellers acquires some power over its price. Now, if it tries to sell its output for more than the competitive market price, it will sell some positive quantity of goods, but fewer than it would sell under competition. This will be the optimal strategy for many a profit-maximizing seller who must charge the same price to all prospective purchasers.[74] Such a seller will charge a price higher than the competitive price, and thus higher than marginal cost. This differential between price and marginal cost is said to constitute a misallocation of social resources and thus to decrease social welfare. Society at large would like to see more resources flow into production of the seller's good, to the point where price, which represents the social value of the output, and marginal cost, which represents the social value of the inputs, are equalized. If there are no countervailing social benefits from monopoly, such as an increase in productive efficiency (the monopoly might be able to produce the same goods with fewer inputs) or a reduction in search costs (it is presumably easier to choose which seller to patronize if there are fewer of them to choose from), monopoly reduces social welfare and is therefore inefficient.

Almost all economists who talk about social welfare or social value in this fashion use it to mean the sum of the welfare of

74. If the seller charges more than the competitive price and consequently sells fewer than the competitive number of goods, he will lose the revenue from those sales. But he will gain the revenue that comes from charging a higher price for the goods that are in fact sold, as well as the costs of producing the larger quantity of goods.

society's individuals. This summing takes a number of different forms, the most important of which are critically examined in this section and subsequent sections. For the moment, however, it is useful to *take literally* the definition of efficiency as maximization of social welfare, without attempting to disaggregate social welfare into the welfare of society's individual components.

A literal conception of social welfare seems to run headlong into the problem of methodological individualism. Only concrete individuals can have goals or ends, because only concrete individuals can engage in purposeful action. To the extent that welfare relates to the satisfaction of human goals or ends, it is a concept applicable only to individuals, not to collective entities like society, which can be said only metaphorically to "act."

There are many contexts, however, in which we do speak of the welfare of entities other than human individuals. We frequently discuss not only social welfare, but also the welfare of smaller social units like families or corporations. This kind of talk is coherent as long as there is an intelligible standard by which statements about welfare can be evaluated. For example, in the case of a corporation, we can invent accounting methods that let us define a conception of corporate welfare—for example, as the maximization of the present value of the corporation's net income stream. An outside observer can then evaluate actions taken by individual actors on behalf of the corporate entity by reference to their promotion of this objectively discernible end. Indeed, we can refer to the "welfare" of inanimate objects as readily as we can refer to the "welfare" of corporations or other social entities. All that is necessary is to posit some standard by which "welfare" can be measured. For example, one can judge the "welfare" of the Rock of Gibraltar by specifying some measurable physical state (such as size, mass, or location) as the standard. Action can then either enhance or reduce the Rock of Gibraltar's "welfare" to the extent that it promotes or disserves this end.

All such "welfare" measures are coherent, but only because they bear no relationship to human satisfaction. If "welfare" is instead being used as a proxy for "utility," and if "utility" means "experiential satisfaction,"[75] then all of these welfare measures do in fact founder on the shoals of methodological individualism. Only acting, conscious individuals can experience satisfaction.

75. *See supra* notes 37–44 and accompanying text.

Thus, when we speak of the welfare of, say, Exxon or the Rock of Gibraltar, we must guard carefully against equivocation. Principles that have one meaning in connection with the economic welfare of acting individuals may need to have entirely different meanings in connection with the "welfare" of corporations or rocks.

Similarly, there is an infinite number of coherent "welfare" standards that can be applied to a social entity such as a nation.[76] If a nation is small enough so that, in theory, all of its assets, including its people, could be sold in a market, it may be possible to apply to it an accounting standard analogous to that employed for corporations. Even in larger societies, where no such market for assets is possible,[77] one can yet make comparative judgments about social welfare, as we do when we say that the level of welfare in the United States is higher than in Cuba, as long as one refers to a standard that is interpersonally measurable. This "welfare" measure might refer to some physical quantity, such as the number of televisions or automobiles per household, the number of apples consumed per year, the ratio of immigrants to emigrants, the total weight of all ducks that migrate over the territory, or some index of such measurable quantities. Alternatively, a judgment that welfare is higher in the United States than in Cuba could mean something like, "The overwhelming majority of people in the United States prefer their present condition to what they think their condition would be if they lived in Cuba." All such standards are perfectly comprehensible and yield intelligible, and possibly even useful, notions of social welfare. They do not, however, appear to be what modern law and economics scholars who speak of social welfare have in mind.[78]

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76. Conventionally, "social welfare" almost always is taken to refer to the welfare of a particular nation-state. There is obviously nothing inevitable about this convention. The relevant unit of welfare analysis could be as small as an individual or as large as the universe.

77. The absence of real markets for such large asset stocks renders highly questionable such concepts as gross national product or national wealth. It is physically possible to add up the dollar amount of every recorded monetary transaction in an economy, but it is not at all obvious what is thereby measured. One is certainly not measuring the total market value of every good or service that is bought or sold, because there is no actual market for "every good or service that is bought or sold." The whole does not necessarily equal the sum of its parts, as any corporate bust-up artist can verify.

78. They were, however, precisely what earlier generations of economists had in mind. *See* Robert Cooter & Peter Rappoport, *Were the Ordinalists Wrong About Welfare*

When modern law and economics scholars speak of social welfare, they seem typically to have in mind an account of welfare as the satisfaction of individual human preferences.[79] Society is not literally treated as a distinct, acting entity, but is viewed as the totality of its individual membership. Social welfare is then identified as the sum—or, if calculus is employed, the integral—of the welfare of each individual member of the society, where "welfare" is understood in terms of preference satisfaction.[80] When the economic case against monopoly described earlier employs the concept of social welfare, it does so in this sense: It claims that the overall welfare of society, viewed as the sum of the welfare of each individual actor, is maximized when resources are priced at their marginal cost.

This aggregative account of social welfare, however, runs afoul of the interpersonal comparability problem: There is no way to add, subtract, compare, or contrast the economic welfare, understood as the satisfaction, of *A* and *B*. In the case of monopoly pricing, for instance, some people, such as the monopolists, gain in welfare from the move from competition to monopoly, while others, such as the consumers of the monopolized product, lose. There is no way to aggregate those welfare gains and losses; the subjectivity of utility means that those gains and losses are literally incommensurable.

The intellectual price of discussing economic welfare as the satisfaction of human preferences is that the discussion must be confined to individual actors. One can coherently, and perhaps even usefully, talk about social welfare, but one cannot do so using the language of satisfaction. And if one means by "welfare" something other than human satisfaction, one ought to say so and

Economics?, 22 J. ECON. LITERATURE 507, 512–20 (1984) (describing what they call the "material welfare school" of economics that predominated in the late nineteenth and early twentieth centuries).

At a minimum, any economist who has such a measure in mind should spell it out with enough precision to enable people to evaluate the usefulness of the model.

79. Those preferences might be actual or ideal. One could aim at maximizing the satisfaction of (or the results from satisfying) existing preferences or at maximizing the satisfaction of (or the results from satisfying) the preferences that one believes people ought to have.

80. *See* COOTER & ULEN, *supra* note 1, at 51 (describing the social welfare function as "a mathematical function that indicates how the utility of individuals in society are to be aggregated in order to compute social welfare").

then explain why that meaning is descriptively important or normatively significant.

2. *Is "Social Welfare" Really "Socialist Welfare"?* Assume that we have agreed upon some coherent conception of social welfare, such as maximizing the average daily caloric intake of the relevant population. That conception can be used to describe the effects of various actions, such as a change in tort doctrine, or to serve as a normative guide.

Any normative use of such a conception, however, effectively designates a collectivity—the relevant society—as the appropriate beneficiary of moral conduct. Accordingly, any normative theory that relies on a social welfare conception of efficiency is *morally collectivist*—that is, it holds that people ought to act to enhance the interests, however defined or measured, of some group of persons extending beyond, though perhaps including, themselves.[81] Of course, one must distinguish this moral collectivism from *political* collectivism, which may or may not flow from it. A moral collectivist may believe, for example, that the best way to achieve morally collectivist goals is to leave a great deal of room for individual autonomy, such as private management of economic resources, so that her concrete policy recommendations would widely be regarded as (politically) "individualistic." But regardless of the

81. The possible alternatives to moral collectivism are moral individualism, in which a single, identifiable person is the appropriate beneficiary of moral conduct, or a theory in which no person is an appropriate beneficiary of moral conduct. One cannot call this latter alternative moral nihilism, because one could believe in moral values but hold that some nonperson, such as God, Nature, or the Rock of Gibraltar, is the appropriate beneficiary of moral conduct. In the absence of an obvious label for this position, I will invent one and call it moral ciphericism.

Two features of this definitional schema bear emphasis. First, moral individualism can be either egoistic or altruistic. That is, the person who serves as the standard for evaluating an actor's conduct can be either the actor or someone other than the actor. Similarly, moral collectivism can be purely altruistic (the actor is not among those who serve as the relevant objects or units of normative discourse) or partly egoistic and partly altruistic (the actor counts, but others count as well).

Second, this schema is purely formal: It identifies only the relevant beneficiary of moral action, not the substantive standard by which actions are evaluated. Consider, for example, an individualistic ethical theory which declares that Al Franken is the appropriate beneficiary of all moral conduct. This tells us that the morality of actions must be judged by reference to Al Franken, but it does not tell us to what features of Al Franken we must look to determine an action's moral status. Theories that instruct us to maximize (1) Al Franken's satisfaction, (2) Al Franken's weight, or (3) Al Franken's suffering, are all, from a formal perspective, morally individualistic.

character of these political recommendations, the entity for whose interests all resources should be deployed—and thus, in the most fundamental sense, the moral owner of those resources—is a group or collective.

A social system in which the collective is viewed as the ultimate owner of all resources is commonly called *socialism*. All advocates of a social welfare conception of efficiency as a normative guide to conduct are thus moral socialists, notwithstanding the particularistic policy proposals they may advance. They might (or might not) differ from moral socialists like Karl Marx or Ted Kennedy in the degree to which they would seek to achieve socialist goals through nominally private stewardship of resources, but they all agree that the ultimate beneficiary of moral conduct is the collective rather than the individual.

Of course, to describe a moral theory as socialist, especially in the distinctively nonpolitical sense in which that term is used here, is not to condemn it; socialism might in fact be the correct moral posture, even for people who reject socialism as a method of political organization. I mean only to identify it as a too-often-overlooked presupposition of law and economics moralizing that employs concepts of social welfare.

B. *Efficiency as Pareto Superiority or Pareto Optimality*

Few law and economics scholars would quarrel to any great extent with my methodological criticisms of the social welfare definition of efficiency. When pressed, most would surely concede that interpersonal welfare comparisons, where "welfare" is understood to refer to human preference satisfaction, are inadmissible, and that an aggregative social welfare measure that purports to sum up the welfare of the various individuals in a society makes no sense.[82] Indeed, the thrust of welfare economics since Lionel

82. At least, they would surely concede this in their more careful moments. In less careful moments, which occur with great frequency in informal law school discussions, the strictures against interpersonal welfare comparisons are violated as often as they are observed. Even in formal published works, scholars often deny the possibility of interpersonal utility comparisons in one breath and affirm it in the next. *See, e.g.*, LANDES & POSNER, *supra* note 12, at 18 (1987) (describing how in principle a legislature could "redistribute wealth until the marginal utility of a dollar is the same to everybody"); POSNER, *supra* note 1, at 12 (describing a situation in which a poor family would experience "greater happiness" than a rich one); *id.* at 14 ("A legally coerced transaction is less likely to promote happiness than a market transaction, because the misery of the

Robbins's classic argument in the 1930s for the impossibility of scientific interpersonal welfare comparisons[83] has been to formulate concepts of efficiency that avoid the obvious problems plaguing the "social welfare" model. The trick is to formulate a definition of social efficiency that takes seriously both methodological individualism and economic subjectivism.

1. *Pareto Superiority and Pareto Optimality.* The prime candidate for such a definition is Pareto superiority. A change, or action, is Pareto superior if it makes at least one person better off by his own standards and no one worse off by her own standards.[84] This simple definition complies fully with methodological individualism: It directs attention only to the actions and welfare of concrete individuals, one at a time. It avoids altogether the problem of interpersonal utility comparisons, as each person's utility is evaluated by her own subjective standards, and no attempt is made to combine or compare utility arithmetically. Moreover, it seems to be a morally attractive model. In a Pareto superior transaction, somebody gains and nobody loses. Who could possibly object?

The answer is that *no one* can object—by definition. If someone is disadvantaged by an action, then by virtue of that fact the action is not Pareto superior. This points up the well-recognized problem with Pareto superiority as a descriptive or normative concept in a social setting: It is perfectly coherent, but it simply isn't very useful.[85] Almost nothing, and perhaps even nothing, meets the strict criteria of Pareto superiority in the real world if one is seeking to define "efficiency" for an entire society.

(uncompensated) losers may exceed the joy of the winners."); *see also supra* note 59. If satisfaction or happiness is literally incommensurable across persons, these statements are incoherent.

83. *See* LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 139–41 (2d ed. 1935). On Lord Robbins's pivotal role in the history of economic thought, see NICHOLAS MERCURO & TIMOTHY P. RYAN, LAW, ECONOMICS AND PUBLIC POLICY 70 (1984); Hovenkamp, *supra* note 21, at 1034–36.

84. The standard is named for Vilfredo Pareto, who is typically given credit for devising it. *See* Calabresi, *supra* note 10, at 1215 n.14. For more elaborate discussions of Pareto superiority (and Pareto optimality), see COLEMAN, *supra* note 6, at 71–76; POSNER, *supra* note 1, at 12–13.

85. *See* POSNER, *supra* note 1, at 12; Calabresi, *supra* note 10, at 1216–17; Hovenkamp, *supra* note 17, at 9.

Consider the simplest possible model of voluntary, mutually beneficial exchange: *A* trades *B* an apple for a banana. *A* and *B* are both happy with the transaction. If the relevant universe consists only of *A* and *B*, that is the end of the matter: The exchange is Pareto superior. But in all real-world universes in which legal rules operate, there are numerous *C*s and *D*s out there as well. There are many reasons why one or more of these *C*s might deem himself worse off as a result of the transaction. For example, *C* might be a curmudgeon who is distressed by the prospect of people experiencing satisfaction,[86] an egalitarian who, rightly or wrongly, regards the transaction as exacerbating wealth differences among people,[87] or a die-hard Marxist who finds the very idea of voluntary exchange intolerable. *C* might also doubt whether *A* or *B* *deserve* to gain satisfaction, either because he thinks that they are unworthy people or because he believes that *D*, rather than *A* or *B*, is the rightful owner of the apple or banana.[88] Finally, even if no one in the world but *A* and *B* ever learns of the transaction, it is inconceivable that its ripple effects will have no actual adverse consequences for third parties. If *A* and *B* do not transact, they will each take some other course of action. That different course will alter the behavior of other people, and so on. Can it really be the case that no person in the relevant universe would be better off, by their own lights, by virtue of this alternative course of events?[89] Moreover, if we are seeking to analyze the *rules* that legal decisionmakers do or ought to promulgate and follow, as seems to be the case with all law and economics scholarship of which I am aware,[90] it is hard to imagine that those

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86. *Cf.* Lawrence G. Sager, *Pareto Superiority, Consent, and Justice*, 8 HOFSTRA L. REV. 913, 917–18 (1980) (raising the possibility of envy as an obstacle to Pareto superiority).

87. *See* Calabresi, *supra* note 10, at 1217; Ronald Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563, 583 (1980).

88. *See* COLEMAN, *supra* note 6, at 93, 128–29. Coleman suggests that moral considerations of this kind should lead us to deny that Pareto superior transactions necessarily warrant our moral approval. It seems to me that they instead call into question whether the transactions are in fact Pareto superior. *See* Calabresi, *supra* note 10, at 1217.

89. *See* POSNER, *supra* note 1, at 12 (noting that "most transactions . . . have effects on third parties, if no more than by changing the prices of other goods").

90. Posner is explicit on this point. *See* Posner, *supra* note 12, at 103 ("It must also be emphasized that it is a *political* philosophy that I am expounding."); *cf.* John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 224–25, 245 (1985) (cautioning against using his prescribed methods of moral reasoning to derive

rules could entirely escape the notice of every curmudgeon, egalitarian, and Marxist who would find some ground on which to object to voluntary transactions. And, in fine individualist fashion, it takes only one curmudgeon, egalitarian, or Marxist to prevent an action from being Pareto superior. Thus Pareto superiority is methodologically coherent, but normatively and descriptively empty.

These problems carry over to the related concept of Pareto optimality. Pareto superiority describes *changes* or *actions*; Pareto optimality describes *states of affairs*. A state of affairs is Pareto optimal, and hence efficient, if no Pareto superior moves can be made from it—that is, if any changes from that state of affairs must make at least one person worse off by his own standards. Again, this is a coherent definition of efficiency: It views each individual as an individual, and there is no attempt to make interpersonal comparisons of welfare. But again, the definition is empty. If Pareto superior moves are a virtual impossibility (or a flat-out impossibility in the case of changes in legal rules), then any given state of affairs will be Pareto optimal. Efficiency then does not distinguish one state of affairs from another, and hence serves no cognitive purpose: Whatever is, is efficient.[91]

principles of individual conduct rather than specifically political principles).

91. For a somewhat different demonstration of the emptiness (or, perhaps one should say, the fullness) of Pareto optimality, see Calabresi, *supra* note 10, at 1215–17.

2. *Is Paretianism a Communist Plot?* It is easy to see that the normative social welfare conception of efficiency involves collectivist, or socialist, moral presuppositions—as Judge Posner has recently acknowledged.[92] It is slightly more difficult to see that Paretian definitions of efficiency have the same property. An action is Pareto superior, and hence efficient, only when the action makes no person in the relevant community worse off by that person's own standards. If Pareto superiority is adopted as a normative criterion, then the goodness of an action must be evaluated by reference to its effects on numerous persons other than the actor, including curmudgeons, egalitarians, and Marxists. Because of this, Paretianism is at root just as socialistic a notion as the social welfare definition of efficiency. Pareto superiority and Pareto optimality respect the principles of *methodological* individualism, in that they treat society as a collection of discrete persons rather than as an entity in itself. But they do not respect the principles of *normative* individualism, in that they consider the appropriate beneficiary of moral action to be a group of individuals.

Again, to describe the various Paretian standards as socialist or collectivist, in the specialized sense in which those terms are employed here, is not to criticize them; socialism may in fact be the appropriate normative posture. But that is surely a position that is not self-evident.

C. *Efficiency as Potential Pareto Superiority*

Economists have long been aware of the limited utility of Paretian standards of social efficiency. This strongly suggests that Paretianism is not what most economists have in mind when they talk about social efficiency. If efficiency means Pareto superiority, economists in the real world will have literally no occasion to use it; and if it means Pareto optimality, economists will have literally every occasion to use it, and it will therefore tell us nothing of interest. But in fact economists frequently talk about efficiency as though they were describing or prescribing something of consequence. If they don't mean efficiency as social welfare, because of that definition's oft-acknowledged methodological problems, and if

92. POSNER, *supra* note 13, at 376–80.

they don't mean efficiency as Paretianism, because of that definition's oft-acknowledged uselessness, then what do they mean?

The likely answer is provided by Judge Posner:

> Because the conditions for Pareto superiority are almost never satisfied in the real world, yet economists talk quite a bit about efficiency, it is pretty clear that the operating definition of efficiency in economics is not Pareto superiority. When an economist says that free trade or competition or the control of pollution or some other policy or state of the world is efficient, nine times out of ten he means *Kaldor-Hicks efficient* . . . .[93]

A formal definition of Kaldor-Hicks efficiency is offered by Jules Coleman:

> One state of affairs (E′) is Kaldor-Hicks efficient to another (E) if and only if those whose welfare increases in the move from E to E′ could fully compensate those whose welfare diminishes with a net gain in welfare. Under Kaldor-Hicks, compensation to losers is not in fact paid. Were the payment transaction costless and full compensation given to the losers, Kaldor-Hicks distributions would be transformed into Pareto-superior ones. This characteristic of Kaldor-Hicks has led some to refer to it as a "potential Pareto-superior" standard.[94]

The meaning of Kaldor-Hicks efficiency can best be grasped by understanding its origin. Kaldor-Hicks efficiency emerged from the efforts of economists, most notably Nicholas Kaldor[95] and John Hicks,[96] to explain how Lionel Robbins could be right about

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93. POSNER, *supra* note 1, at 13 (emphasis added); *see also* POSNER, ECONOMICS OF JUSTICE, *supra* note 12, at 91–92 (noting that "when economists say that monopoly is inefficient, they mean inefficient in the Kaldor-Hicks or wealth-maximization, not the Pareto, sense").

94. COLEMAN, *supra* note 6, at 98; *see also* POSNER, *supra* note 1, at 13 ("The Kaldor-Hicks concept is also and suggestively called potential Pareto superiority: The winners could compensate the losers, but need not (not always, anyway)."); Calabresi, *supra* note 10, at 1221–22 (stating that the Kaldor-Hicks test is "sometimes called potential Pareto superiority"); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550–51 (1939) (noting that an economist may justify a policy by simply showing that it is *possible* for winners to compensate losers and still have a net gain).

95. *See* Kaldor, *supra* note 94, at 549.

96. *See* J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939).

the impossibility of interpersonal utility comparisons[97] and yet economists could still have useful things to say about public policy. How could economists claim that certain actions, such as the repeal of the Corn Laws, were efficient when they resulted in gains in utility or welfare for some people but losses for others? In many circumstances, the number of people who gain from an action is much larger than the number who lose, but without the ability to make interpersonal comparisons, it seemed that economists would have no way to deem the gains to the winners "larger" than the losses to the losers.

The task was thus to avoid any such interpersonal comparisons without running afoul of the unrealizable unanimity requirements of Pareto superiority. The solution was to claim that in many circumstances those who gained from an action *would be able in principle* to pay off those who lost, such that the "losers" would no longer regard themselves as losers, and there would still be something left over for themselves, the "winners." Thus, one would not need to say that the winners gained "more" than the losers lost (though some economists would in fact say this, including those who should know better).[98] One would only have to say that the losers could be fully compensated and the winners would have something left over, without implying any aggregative, interpersonal utility judgments. Hence, as Professor Coleman observes, the standard is often called potential Pareto superiority.[99] If the losers are in fact compensated for their loss, then by definition there are no losers and the Pareto standard is satisfied. Thus, as long as such compensation is possible, an action is *potentially* Pareto superior. The catch is that under Kaldor-Hicks efficiency, one can call the action efficient *whether or not the losers are in fact compensated.* Hence, even if there are losers in fact, and the strict Paretian criterion of unanimity is therefore not satisfied, economists can nonetheless make judgments of efficiency without violating either methodological individualism or the constraint against interpersonal utility comparisons.

It is tempting to criticize Kaldor-Hicks efficiency for falling prey to the same fallacies that undermine utility-based versions of the social welfare conception of efficiency.[100] Kaldor-Hicks effi-

97. *See supra* text accompanying note 83.

98. *See, e.g.*, LANDES & POSNER, *supra* note 12, at 16.

99. *See* COLEMAN, *supra* note 6, at 98.

100. *See, e.g.*, Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and*

ciency seems to "require[] the economist to proceed as if a dollar were equally valuable to everyone,"[101] which obviously violates the strictures against interpersonal comparisons.[102] But this criticism is off the mark. In its pristine form, Kaldor-Hicks efficiency does not have to make any interpersonal welfare assumptions. It need only assume that all of the self-defined real-world losers from an action could, by their own standards, be turned into non-losers by appropriate compensation from the winners, while still leaving the winners with something.[103] In the absence of actual compensation, one of course cannot make any judgments about welfare as preference satisfaction (beyond the obvious fact that some people's welfare is enhanced while others' is reduced);[104] but the whole point of Kaldor-Hicks efficiency is to provide an *alternative* to the preference-based social welfare conception of efficiency. The concept of Kaldor-Hicks efficiency, whatever other defects it may have, is coherent.

It is, however, as useless as Pareto superiority. Kaldor-Hicks efficiency purchases its coherence by requiring that compensation be hypothetically possible in such a way as to guarantee that each person, *by her own standards*, does not come away a loser, just as strict Paretianism requires that each person judge herself to be as well off or better off than before. All it takes to make the universe of Kaldor-Hicks-efficient transactions an empty set is one person who sincerely cannot be bought—that is, a person who values autonomy, either his own or that of others, so highly that no amount of after-the-fact compensation could possibly leave him as well off as he would have been had the loss never been inflict-

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Economics Meets the Real World, 24 GA. L. REV. 583, 625 (1990) (stating that Kaldor-Hicks efficiency "requires comparing one party's losses with another's gains").

101. Cooter & Rappoport, *supra* note 78, at 526; *see also* POSNER & EASTERBROOK, *supra* note 72, at 9–10 (contrasting the "wealth" concept of welfare, in which a dollar is assumed to be of the same value to all consumers, and the "utility" concept, in which that assumption is dropped); Hovenkamp, *supra* note 10, at 849 (discussing the Kaldor-Hicks assumptions that individuals derive the same utility from a dollar of income and that the marginal utility of income is constant).

102. *See* Calabresi, *supra* note 10, at 1223; Hovenkamp, *supra* note 10, at 833–34; Hovenkamp, *supra* note 21, at 1041.

103. *See* Kaldor, *supra* note 94, at 551 n.1.

104. *See* Calabresi, *supra* note 10, at 1223.

ed (without consent) in the first place.[105] In a large population, no legal rule will ever satisfy the Kaldor-Hicks efficiency criterion.

The morally collectivist character of Kaldor-Hicks efficiency as a normative criterion does not warrant extended discussion. It is obvious that Kaldor-Hicks efficiency is morally collectivist, for the same reasons that Paretianism is morally collectivist.[106]

D. *Efficiency as Social Wealth Maximization*

If Kaldor-Hicks efficiency is indeed as useless as Pareto superiority, perhaps economists who talk about efficiency are not really using the term in its pristine Kaldor-Hicks sense. And in fact, economists typically add some assumptions to the Kaldor-Hicks framework to give it more real-world application.

The objects of inquiry for the Paretian or Kaldor-Hicks economist are the values that people actually hold, for good or ill. Utility is understood to flow from achievement of those values. This focus on preference satisfaction meets the twin demands of methodological individualism and economic subjectivism, but it also renders efficiency useless as a descriptive tool or normative guide.

The search for a more robust conception of efficiency leads many economists to look at ends other than preference satisfaction, such as the production of *wealth*. This yields yet another oft-employed definition of efficiency: An action is efficient to the extent that it maximizes social wealth. The operative principle of wealth maximization is clearly described by its leading proponent:

> The "wealth" in "wealth maximization" refers to the sum of all tangible and intangible goods and services, weighted by prices of two sorts: offer prices (what people are willing to pay for goods they do not already own); and asking prices (what people demand to sell what they do own). If A would be willing to pay up to \$100 for B's stamp collection, it is worth \$100 to A. If B would be willing to sell the stamp collection for any price above \$90, it is worth \$90 to B. So if B sells the stamp collection to A . . . , the wealth of society will rise by \$10. Before the transaction A had \$100 in cash and B had a stamp collection worth

105. *See* COLEMAN, *supra* note 6, at 138 (suggesting that persons who place an infinite value on autonomy can defeat the legitimacy of forced exchanges under Kaldor-Hicks principles); Rothbard, *supra* note 25, at 98. Kaldor was aware of this point, though he obviously did not appreciate its significance. *See* Kaldor, *supra* note 94, at 551 n.1.

106. *See supra* text accompanying note 92.

> $90 (a total of $190); after the transaction A has a stamp collection worth $100 and B has $100 in cash (a total of $200). The transaction will not raise measured wealth—gross national product, national income, or whatever—by $10; it will not raise it at all unless the transaction is recorded, and if it is recorded it is likely to raise measured wealth by the full $100 purchase price. But the real addition to social wealth consists of the $10 increment in *nonpecuniary* satisfaction that A derives from the purchase, compared with that of B.[107]

In other words, one considers only those preferences that are backed by a willingness and ability to pay money in a market. One can then (at least in principle) sum up the present value of all of the dollar equivalents of those preferences in a relevant society at any given instant to yield a social wealth figure,[108] and one can describe or evaluate actions by reference to their effects on this figure.

Social wealth maximization, as thus defined, is a coherent concept. It complies fully with methodological individualism; social wealth means merely the sum of the wealth of all individual members of society. Furthermore, it does not require any interpersonal utility comparisons. Indeed, it does not require any references to utility at all. Wealth maximization measures wealth, not utility, and no one can deny that wealth, as the theory defines it, is interpersonally aggregable.[109] Finally, social wealth maximization is a robust concept. There may be insurmountable informational obstacles to determining the actual full social wealth effects of any particular action, but there are surely ranges of cases in which one can make reasonably good guesses about effects on social wealth as the theory defines it.[110] Hence, by abandoning reliance on utility or welfare measures, social wealth maximization avoids the method-

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107. POSNER, *supra* note 13, at 356. David Friedman attributes the early development of this conception of efficiency to Alfred Marshall. *See* FRIEDMAN, *supra* note 17, at 351–54. For useful clarifications of the concept of wealth, see D. Bruce Johnsen, *Wealth Is Value*, 15 J. LEGAL STUD. 263, 268 (1986).

108. The present value aspect of the definition of wealth is critical to the wealth maximization concept, for reasons that are happily incidental to my argument. For an important and elegant discussion, see Johnsen, *supra* note 107, at 270–74.

109. One must, of course, keep in mind that such aggregations cannot be viewed as representing the value of the total stock of goods and services in the society. *See supra* note 77. But this goes to the usefulness of the concept of wealth maximization rather than to its coherence.

110. *See* Johnsen, *supra* note 107, at 284–87.

ological problems of interpersonal comparisons while maintaining a real-world domain of application that Paretianism and Kaldor-Hicks efficiency cannot claim. But like the various social welfare definitions that similarly attain coherence,[111] social wealth maximization thereby ceases to be a concept of efficiency in any meaningful *economic* sense.

This last point is partly semantic, but only partly. To understand what I am getting at, consider a theory of efficiency as social *weight* maximization, where the object is to maximize the sum of the weights of all individual members of society. (Whether one is trying to maximize average weight or total weight is not important.) An action is efficient under this theory to the extent that it increases social weight more than do alternative courses of action. This is a coherent theory of efficiency. It violates neither methodological individualism nor the strictures against interpersonal utility comparisons. It simply requires maximization of an objectively determinable quantity. As with measuring social wealth, attempts to trace through an action's weight effects on all members of society face insuperable informational problems, but there will surely be a range of cases in which reasonable guesses can be made.

No one, of course, uses weight maximization as a standard of efficiency. But why not? One good and complete answer would be that wealth maximization can help generate good predictions, whereas weight maximization cannot (or at least has not been shown to be a useful part of a fruitful predictive model). But scholars who are interested in description or prescription need another answer—and they need to be careful about it.

A natural suspicion is that wealth maximization has proven attractive because it seems like a reasonable proxy for welfare-as-preference-satisfaction. We cannot directly measure satisfaction, one might argue, but it is plausible to think that wealth is somewhat connected, even if imperfectly, to satisfaction. Maximizing wealth may not maximize welfare or satisfaction, the argument might continue, but it is as close as we can come.

Such reasoning is seductive—and it is dangerously wrong. The moment that one tries to relate wealth to welfare or preference satisfaction in any way that involves interpersonal aggregations or comparisons, wealth maximization disintegrates into incoher-

111. *See supra* text accompanying notes 72–80.

ence.[112] Interpersonal utility comparisons are category mistakes. They cannot be made directly, they cannot be modelled, and they cannot be represented by proxies. A proxy for a category mistake is simply another category mistake. Persons who employ a wealth maximization conception of efficiency thus need to guard vigilantly against the fallacy of equivocation, in which they shift from efficiency-as-wealth-maximization to efficiency-as-wealth-maximization-as-proxy-for-preference-satisfaction. Wealth is one thing (which happens to be interpersonally comparable), satisfaction is another (which happens not to be interpersonally comparable), and never the twain shall meet.

None of this, of course, requires abandonment of, or even significant revisions in, the enterprise of law and economics. It may well be that a measure of social wealth that bears no coherent relationship to human satisfaction can serve many useful functions, just as a measure of social weight might be useful. It may, for example, help one accurately predict the outcomes of common law adjudications. It may help one systematize and apply a normative theory. One might even be able to argue that social wealth (or social weight) *ought* to be the appropriate standard of value for human conduct. But those who use the concept of social wealth should be aware that they cannot be saying anything, or at least anything useful, about human satisfaction.[113]

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112. *See* Hovenkamp, *supra* note 21, at 1045 & n.257. Professor Hovenkamp has nicely demonstrated the unbridgeable gap between social wealth maximization and social welfare maximization. *See* Hovenkamp, *supra* note 10, at 826–47. But his discussion rests on the assumption that wealth maximization is designed to be a surrogate welfare measure. *See id.* at 816, 825, 835. It is in fact an alternative to welfare measures, which means that its principal fault is not incoherence or undisclosed normativity, but simply susceptibility to equivocation—as Professor Hovenkamp elsewhere recognizes. *See* Hovenkamp, *supra* note 15, at 68–69. Of course, if someone does try to use wealth maximization as a proxy for welfare maximization, Professor Hovenkamp's critique is unanswerable.

113. This is a bit of an overstatement in two respects. First, behind every increment of social wealth lies a preference, so it is false to say that wealth is wholly unrelated to preferences and hence to their satisfaction. But it is unrelated in any way that permits interpersonal comparisons. Second, wealth might have a very close relationship to human welfare in some noneconomic sense that does not depend on preference satisfaction. That is, one might have some coherent conception of social welfare (such as maximizing average daily caloric intake) that one believes will be well served by maximizing social wealth as a proxy. In that case, however, one needs to spell out the coherent conception of social welfare for which wealth maximization is a stand-in.

I have no doubt that Judge Posner and others of his stature are aware of these problems.[114] I have grave doubts, however, that most persons who purport to be applying law and economics, whether in print or in casual conversation, have the same level of awareness. If they believe that by discussing efficiency they are saying something about human satisfaction, either directly or by proxy, they are mistaken. If they correctly understand the meaning of efficiency and still want to talk about it, that is their business, just as it is their business if they want to talk about social weight maximization. They need only tell us what they are doing, and perhaps why.

Needless to say, social wealth maximization as a normative ideal is every bit as morally collectivist as the various social welfare conceptions of efficiency discussed earlier.[115]

E. *Efficiency as Social Coordination*

A number of economists in the Austrian tradition[116] have proposed a definition of economic efficiency as the maximization of plan coordination.[117] The definition stems from the fact that individuals do not simply maximize preference satisfaction at given points in time in light of given resources—they also plan for the future; and indeed they do the latter more than the former. Those plans must involve the anticipated use of resources, as one cannot achieve ends without the use of means. In a social setting, where many people might have conflicting plans for the same resources, one's ability to formulate and then execute sensible plans depends on the extent to which those plans can successfully be *coordinated* with the inconsistent plans of others. The primary economic problem facing a society, in other words, is not the maximization of satisfaction in light of known preferences and resources but rather the coordination of individual plans in the face of uncertainty

114. In any event, if I have correctly understood Judge Posner's approach to moral theory, most if not all of his project survives this critique intact. *See supra* text accompanying notes 67–68.

115. *See supra* text accompanying note 81.

116. *See supra* note 55.

117. *See* DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 29-30 (1982); Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12 HAMLINE L. REV. 229, 237-39 (1989); Israel M. Kirzner, *Philosophical and Ethical Implications of Austrian Economics*, *in* FOUNDATIONS, *supra* note 25, at 75, 85.

about the future. Individuals can only formulate and pursue their plans efficiently if they have tolerably accurate information about the way in which those plans will mesh, or fail to mesh, with the plans of others. Hence, the most plausible account of social efficiency, some Austrians argue, is as a (rough, qualitative) measure of the extent to which institutions foster or inhibit individual plan coordination. As one Austrian puts it, "[t]he task that is faced by economic analysts in attempting to maximize economic efficiency for society is to identify legal institutions that minimize conflicts in the use of resources and allow the economic system to maximize the dissemination and use of knowledge."[118]

The problem is that this is not really an alternative definition of efficiency, but is instead simply a different variant of either Pareto superiority or social welfare maximization. In order to judge an action or institution efficient, must it improve plan coordination for *each and every person* in the relevant community? If so, then plan-coordination efficiency is a form of Pareto efficiency, with plan coordination substituting for preference satisfaction as the point on which agreement must be secured. As such, it is subject to the same problem faced by Paretianism: One sociopath is enough to destroy the efficiency of every action or institution. If an action can be efficient without improving coordination for everyone, then there must be some way to compare and maximize plan coordination across persons. That appears to be identical in form to social welfare maximization conceptions of efficiency, with plan coordination again substituting for preference satisfaction. The Austrian alternative thus does not provide a conception of social efficiency that is simultaneously coherent, robust, and economic.

III. ENOUGH IS ENOUGH

The suspicion arises that a conception of social efficiency that is simultaneously coherent, robust, and economic is simply not to be found. To the best of my knowledge, no one has provided one, and the arguments in this Article at least suggest that no one ever will. It makes sense to talk about efficiency in the context of a given individual's plans and preferences, but the term does not translate well when one tries to apply it to groups of individuals.

118. Cordato, *supra* note 117, at 239.

Perhaps the time has come for economists and law and economics scholars simply to stop talking about social efficiency altogether.

That does not mean, of course, that they should stop talking about law and economics. As I have repeatedly emphasized, to the extent that law and economics is fundamentally about prediction, it must worry only about the usefulness of its predictive conclusions, not the model that generates them. Similarly, there is an important role for law and economics in identifying the consequences of various actions and legal rules. Finally, nothing in this Article suggests that people should abandon the search for a normative ideal couched in economic terms. All I ask is that if people use the concept of social efficiency, they be clear about its meaning and apply that meaning consistently. If one constructs an argument of the form "all efficient rules are *X*; *A* is an efficient rule; therefore, *A* is *X*," one must be sure that the term "efficient" has the same, coherent meaning in the major and minor premises. Clarification of this kind does not end all inquiry into such arguments, but it is a necessary first step to understanding them.