EFFICIENCY AS A STANDARD FOR EVALUATING LEGAL RULES

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The application of economic principles to analyze and solve legal problems has become one of the most quickly expanding areas of legal thought. An often overlooked aspect of this discussion is the wisdom of using the criterion of economic efficiency to resolve legal issues. Professor Pannier questions the judiciary's ability to make the necessary economic analyses and argues that judicial use of economic theory raises serious moral issues. Professor Pannier critically examines utilitarianism, Pareto efficiency, and Kaldor-Hicks efficiency to expose shortcomings in those concepts. Professor Pannier concludes that economic efficiency is an inappropriate standard to evaluate legal rules and chooses a natural law theory of the good as a more principled standard allowing for greater human freedom.

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I. INTRODUCTION

In this paper I shall try to state and assess some of the difficulties that arise from attempts to use certain technical analyses of the concept of efficiency to evaluate legal rules. I shall argue that the use of such analyses raises two main issues. First, there is the epistemological problem of making the necessary calculations. In this regard, I shall argue that the judicial system is inherently inadequate to the task. I shall further argue that the very obviousness of

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the inadequacy calls for an explanation of the repeated efforts to develop such analyses. Second, I shall try to show that even if courts could make the necessary calculations, judicial use of such analyses would founder upon the more serious defect of presupposing what I shall call a nonevaluative theory of the good. I shall argue that nonevaluative analyses are inherently inadequate to the task of evaluating legal rules.

The concept of a resource is central to my analysis and will be used in the following sense. A human action is a use of human time. A use of human time has an internal and external dimension. The internal dimension comprises the complex of purposes, conscious and unconscious, which the agent is pursuing. The external dimension consists of all the action's causal consequences. A resource is anything that is usable in the process of human action. The primary resource is human time. All other resources are secondary resources.

I shall assume that existence within a moral framework is an essential part of what it is to be human. I define moral framework as the mixture of moral impulses influencing particular persons at particular times. The moral framework of an individual, considered at a particular time, consists of the total complex of purposes, conscious and unconscious, which he is pursuing at that time. Thus, I define moral framework in terms of the internal dimension of an act; A's moral framework is constituted by the internal dimension of his present use of time. It follows that for any particular use of human time there exists an associated moral framework. I am not suggesting that the converse is not necessarily true; that is, I am not suggesting that an individual's moral framework is necessarily constant over time. I also do not intend to suggest that the complex of objectives making up a moral framework is necessarily internally consistent.

I shall distinguish first-order from second-order efficiency norms. A first-order efficiency norm recommends a particular course of action as an efficient means of pursuing a particular objective. The norm recommends only the means, not the objective itself. For this reason I shall call such norms value-nonspecific efficiency norms. A well-founded first-order efficiency norm is one whose recommended means is efficient. First-order efficiency is action in accordance with well-founded first-order efficiency norms.

A second-order efficiency norm characterizes general conditions under which one ought to pursue first-order efficiency. I shall dis-
tistinguish two kinds of second-order norms. On the one hand, one might recommend first-order efficiency to another with respect to all objectives the latter might choose to pursue. Because of the neutrality of such norms with respect to the actual objectives persons choose to pursue I classify them as value-nonspecific norms. On the other hand, one might recommend first-order efficiency with respect to certain objectives as opposed to others in any situation in which conflict between purposes requires that first-order efficiency be sacrificed somewhere. I shall call such efficiency norms value-specific.

II. FIRST-ORDER EFFICIENCY NORMS

In this section I shall outline the concept of a first-order efficiency norm and characterize the sense in which such norms are morally neutral.

Suppose that A is apparently engaged in the project of building a house. He is working with a large stack of lumber, a barrel of nails, and several handsaws and hammers. The puzzling aspect of his behavior is that he is trying to cut the boards with the claw of one of the hammers and trying to drive nails with the edge of one of the saw blades. Naturally, he is not making much progress. He is badly mangling the ends of the boards which he does manage to cut, has broken several of the hammers, has twisted out of shape some of the saws, and has ruined two out of every three nails he has tried to drive.

Now suppose that B watches A for a time and then tells A that he is proceeding in a very inefficient manner. In particular, B makes the following statements. He claims that A’s methods will result in a substantial waste of A’s time and the building materials and tools. He states that even if A should somehow manage to complete the house, it will probably not be as well constructed as it could be if A used proper building methods. And finally, B warns A that he might not succeed in completing the house at all, given his exceedingly inefficient methods.

Consider the implications of this example. First, note that the question of efficiency has arisen with respect to a mode of action, the apparent construction of a house. The suggested generalization is that the primary subject matter of first-order efficiency concerns is human action. That is, it is primarily ways of doing things that are efficient or inefficient. Statements attributing efficiency or inefficiency to things other than modes of action can be trans-
lated into equivalent assertions about modes of action. For example, a statement attributing inefficiency to a particular machine can be rendered in equivalent terms by a statement attributing inefficiency to the human modes of activity which use the machine. And this is only what we should expect, given the fact that we concern ourselves with tools in order to achieve our purposes.

Because efficiency concerns relate primarily to actions, it is necessary to consider the purposes defining actions. For an action is a use of human time directed toward an end.

B's criticisms are directed to the means A has chosen to achieve his apparent objective, that of building a house. This suggests a second generalization. First-order efficiency considerations concern the selection of means for pursuing a given objective. A statement raising an efficiency concern is ambiguous to the extent that an objective in terms of which alternative means can be said to be efficient or inefficient is left unspecified. The relevant question is never simply whether a mode of action is efficient; it is rather whether a given mode of action is efficient with respect to the pursuit of a particular objective.

What concept of efficiency is presupposed by B's three remarks? The heart of B's criticism is that A is wasting resources, both the primary resource of his own time and the secondary resources of building materials and tools.

What is a claim of waste? As expressed in B's first assertion it is the claim that A could accomplish the same objective with methods that consume fewer resources. That is, B is claiming that A could build the house with less labor time and fewer tools and building materials.

This concept of waste can be made more precise. Let \( O \) be any particular objective. Let \( M_1, M_2, M_3, \ldots, M_n \) be the possible ways of achieving \( O \). A claim of inefficiency of the kind expressed in B's first statement consists of the claim that one of these alternative means, say \( M_i \), is less efficient than one or more of the others in the attainment of \( O \). That is, a claim that \( M_i \) is inefficient is the claim that one or more of the other enumerated means can be used to accomplish \( O \) with less consumption of resources.

Now consider B's second assertion. B warns A that unless A proceeds in a more efficient manner he risks building a house of considerably poorer quality than would result from a use of standard building methods. In what sense is this a claim of waste?
It does not seem to be a claim that one of the available methods for achieving a given objective is less efficient than one or more alternative methods. It seems rather to be a claim that the objective itself may be only partially attained. Notwithstanding the superficial difference, the latter claim is also a claim of inefficiency. This can be seen by considering the implications of the statement that a particular process is wasteful in the sense that there is an alternative means for achieving the given objective with less consumption of resources. Suppose that to be the case in a given instance. It follows that with more efficient means, resources will be freed for use either in promoting more fully the given objective or for promoting some other desired end. If the given objective is one that is capable of accomplishment in varying degrees (such as building a house or producing to meet the economic needs of a society) and if a more complete accomplishment is believed preferable to a lesser degree of success, then the freed resources will be used to more fully promote the given objective. Thus, the mode of inefficiency asserted in B's first statement entails the mode asserted in the second. Both are claims of wasted resources.

A similar point can be made with respect to B's warning that A may not even accomplish his objective. Again, suppose that a certain process is inefficient in the first sense. With the more efficient means, resources will be freed for use either in achieving the given objective or for promoting some other end. Assuming that the actor prefers to attain the given objective with his present resources, the freed resources will be used to achieve that end. Again, the concept of waste presupposed by B's first statement entails that presupposed by the third.

These considerations can be summarized as follows: A claim of first-order inefficiency relates to a specific objective in whose terms alternative means can be said to be either efficient or inefficient. Given a particular objective, O, a claim of first-order inefficiency is the claim that one of the alternative means, M_1, M_2, M_3 . . . , M_n, of achieving O consumes more resources than at least one of the alternatives. Such a claim of waste can be expressed in at least three ways: in the assertion that O could be achieved with less consumption of resources, in the assertion that with the more efficient means O could be more fully realized, and in the warning that O may not be achieved at all.

The significance of the fact that an efficiency claim is conceptually tied to a particular objective can be seen more fully by considering the following examples. Suppose that A responds to B's
criticisms by stating that he is not trying to build a house at all but is rather publicly protesting the employment practices of his employer. A maintains that the purpose of his activities on the job site is to bring about a public confrontation with the employer. This response renders irrelevant B’s claim of inefficiency. Given A’s objective there may be no inefficiency at all; there may be no alternative means that consumes fewer resources than A is using with respect to the objective of forcing a confrontation with the employer.

Thus, a claim of inefficiency is logically tied to the claim that there are alternative means for achieving a given objective. If the objective changes the question of efficiency necessarily changes. A mode of action may be an inefficient means of achieving objective O₁ but an efficient means of achieving objective O₂. A claim of inefficiency or efficiency is ambiguous unless a particular objective is specified in whose terms the question of waste can be addressed. It follows that when an agent engaged in a course of conduct is confronted by an efficiency critic, a necessary condition for the agent’s conceding the relevancy of the critic’s charge is the concession that he is pursuing the objective to which the critic’s objection is tied.

The question arises whether agreement concerning an objective common to both the agent’s conduct and the critic’s charge is not only a necessary condition for joinder on the issue of efficiency, but a sufficient condition as well. The following example suggests a negative answer. Suppose that A is using conventional building methods. He is sawing the boards with a handsaw and driving nails with a hammer. The only criticism in the name of efficiency B can offer is that A is using a handsaw instead of a power saw. B claims that A could build the house more efficiently with a power saw, that using a handsaw consumes more labor time and more energy per unit of labor time and that a power saw makes more accurate cuts. A agrees that one of his objectives is to build a house, but claims that he promised the owner of the lot that he would avoid using power tools out of consideration for the owner’s elderly mother residing next door. Suppose that A also says that his promise to avoid power tools is more important than building the house as efficiently as possible (where efficiency is measured against the objective of building a house only). A concludes that, given both objectives, and given his ranking of one over the other, his methods are efficient.

These points may be generalized. Let O₁, O₂, O₃, . . . , Oₙ be
the objectives an agent A is pursuing with a given course of conduct. Some of these objectives may conflict in the sense that it will not be possible to accomplish each in as great a degree as would be possible, and perhaps desirable, if each was being pursued separately. In such a circumstance A will be forced to make a preference ranking of the objectives in order to resolve conflicts. Thus, suppose that A ranks $O_i$ above $O_j$. Suppose further that a situation arises in which A must choose between achieving $O_i$ at the expense of failing to achieve $O_j$ as fully as would otherwise be possible, on the one hand, and achieving $O_j$ at some cost to $O_i$, on the other. Given his preference ranking, A will try to make sure that $O_i$ is accomplished even though $O_j$ is slighted to some degree in the process.

Let B be a critic who claims that A’s course of conduct with respect to objective $O_k$ is inefficient. A necessary condition for A’s joining issue with B with respect to the efficiency question is that B present A with a plan under which A will be able to achieve all his objectives, $O_1, O_2, O_3, \ldots, O_n$ with less consumption of resources and without sacrificing any objectives A ranks ahead of $O_k$.

This analysis applies to any situation in which an agent has ranked his objectives. In particular, it does not matter whether the objectives are related in a single means-end sequence or whether some are mutually independent. To see this, suppose that A is pursuing objectives $O_1$ and $O_2$. There are at least two possible cases. In one, A is pursuing $O_1$ as a means of achieving $O_2$. In the other, A is pursuing neither $O_1$ nor $O_2$ as a means of achieving $O_2$

Consider the first case. Suppose that A has an ideal conception of $O_2$ that he wants to realize. Thus, outcomes that some would count as achievements of $O_2$ would not satisfy A. A’s particular understanding of $O_2$ will express itself in the way he pursues $O_1$. A will pursue $O_1$ in such a way as to ensure that he will achieve $O_2$ in accordance with his ideal. If challenged about the methods he is using to achieve $O_1$, A’s response will be that he will listen to alternative suggestions only if the alternatives will both save resources and enable him to realize $O_2$ in accordance with his specific intention. Thus, for A, $O_2$ operates as a constraint upon the range of alternative means of achieving $O_1$.

A similar point can be made about the second kind of case. Suppose that A is engaged in a course of conduct directed toward objectives $O_1$ and $O_2$, where neither is pursued as a means to the other. Suppose further that A has ranked $O_2$ above $O_1$ in the sense that, although he desires to achieve $O_1$, he wants to avoid doing
anything that would impair his chances of achieving \( O_2 \). Again, \( O_2 \) operates as a constraint upon A's pursuit of \( O_1 \) in the sense that it rules out certain methods of achieving \( O_1 \).

In either case a necessary condition for persuading A that he is pursuing \( O_1 \) inefficiently is presenting an alternative which both saves resources and does not reduce his chances for achieving his particular understanding of \( O_2 \).

These considerations suggest a way of distinguishing between two kinds of first-order efficiency norms. A *categorical* first-order efficiency norm has the form, "Means \( M_i \) is an efficient way of achieving objective \( O_i \)" where \( O_i \) is the conjunction of all the objectives presently pursued by an agent together with his preference ranking. A *hypothetical* first-order efficiency norm has the form, "If you want to achieve objective \( O_i \) then you ought to use means \( M_i \)." In ordinary circumstances each implies the other.

First-order efficiency norms are value-nonspecific. They are morally neutral in the sense that one making such a recommendation makes no claim with respect to the desirability of the given objective \( O_i \). The claim is simply that a particular means is an efficient way of achieving \( O_i \).

The point made above concerning the ambiguity of efficiency claims which do not specify particular objectives in whose terms alternative means can be said to be efficient or inefficient has an analogue with respect to the concept of cost. The concept of cost is best understood in terms of opportunity cost. The opportunity cost of a given course of action is the next best opportunity that could have been exploited. Clearly, the cost of a given course of conduct depends upon whatever particular objectives one takes to be "next best" in a particular situation. Two observers with different preference rankings of alternative objectives will often differ over the opportunity cost of any given course of conduct. One would take the next best alternative to be X while the other would regard Y as the relevant foregone opportunity. This kind of difference is a difference of moral framework. As I have argued, a moral framework is a function of the totality of objectives an agent is pursuing at any given time. This totality will include an order of objectives which the agent will use, either consciously or unconsciously, to ascertain the cost of other opportunities.

III. SECOND-ORDER EFFICIENCY NORMS

Second-order efficiency norms are recommendations about the general conditions under which it is desirable to pursue first-order efficiency. A second-order norm does not recommend any particular means of achieving a particular objective. In order to provide concrete guidance in any specific case, second-order efficiency norms must be supplemented with appropriate first-order norms. Second-order efficiency norms divide into two classes depending upon whether the norm takes an affirmative position with respect to the desirability of a particular objective.

A generalized efficiency norm urges the policy of doing everything with the greatest possible first-order efficiency. There are no recommendations concerning specific means of pursuing specific objectives. There is simply the general recommendation that whatever one chooses to do, one should pursue one’s purposes with maximum first-order efficiency.

What moral justifications are available for the use of generalized efficiency norms? First, there is the argument that it is always desirable to conserve resources. Resources are scarce in relation to desires. Inefficiency wastes resources. The second argument appeals to the aesthetic sensibility. Even if inefficiencies did not waste scarce resources they would still offend one’s aesthetic desire for elegant solutions. A procedure that accomplishes a given objective with less consumption of resources than another is more elegant, and therefore better, than the other.

There is a sense in which both generalized and first-order efficiency norms are neutral with respect to objectives and for that reason I classify both as value-nonspecific norms. Neither takes an affirmative position concerning the desirability of particular objectives. It might seem to follow that such norms are appropriate in any situation in which there are first-order inefficiencies, but this is not the case. Suppose an agent is pursuing objectives which a potential efficiency critic regards as evil. Would it be justifiable for the critic to urge the agent to pursue his purpose with maximum efficiency? Hence, value-nonspecific efficiency norms are not always morally appropriate. They ought to be applied within the constraints of moral principles which define the outer limits of permissible objectives. It follows that there is a sense in which not even value-nonspecific efficiency norms are morally neutral. From the fact that an efficiency critic makes a first-order or generalized recommendation, one can infer that he does not regard the agent’s
hierarchy of objectives as falling outside the class of morally permissible purposes.

In contrast to first-order and generalized efficiency norms, *value-specific* efficiency norms commit the critic to a position concerning the desirability of a given objective (other than the objective of conserving resources wherever possible, an objective characteristic of any value-nonspecific norm). I shall distinguish between *weak* and *strong* value-specific norms.

For the purpose of illustrating the concept of a weak value-specific efficiency norm, consider critic C who, observing the activities of agent A, refuses to give in to A’s demand that in making any efficiency recommendation, C accept as a given A’s hierarchy and ranking of objectives. C refuses to comply with A’s demand that any efficiency recommendations be either of a hypothetical or generalized form. Suppose that C insists that insofar as A’s course of conduct includes the pursuit of a particular objective, Oj, A pursue Oj with all possible first-order efficiency, regardless of the consequences of such a single-minded pursuit for A’s other objectives. For example, suppose that in our earlier case involving a choice between a handsaw and a power saw C refuses to yield to A’s insistence that he intends to comply with the owner’s request that no power tools be used. C argues that if A intends to build a house A should use the most efficient means possible. What would this attitude imply about the critic’s moral presuppositions? Minimally, it implies that C believes that the objective of building a house ranks above any of A’s other objectives. Additionally, it implies that C believes that A’s preference ranking is inferior to a ranking in which the objective of building a house is ahead of all of A’s other objectives.

This suggests a way of defining the concept of a *weak* value-specific efficiency norm. Such a norm recommends that if a certain objective is pursued at all it ought to be pursued with the greatest possible first-order efficiency, regardless of the cost to other objectives. A weak value-specific efficiency recommendation is necessarily tied to a particular objective (other than the general objective of conserving resources as such). Hence, one makes a weak value-specific efficiency recommendation (with respect to objective Oj) if one advocates that whenever a set of objectives is pursued which includes Oj, Oj should be pursued as efficiently as possible. A critic who insists that because A has chosen to build a house, he ought to use a power saw regardless of any conflicting
commitments would be making a weak value-specific efficiency recommendation.

A strong value-specific efficiency norm is a recommendation that a particular objective be pursued with all possible first-order efficiency whenever it is possible to pursue it at all, not just whenever it happens to be pursued. For example, a critic who insists that everyone use all possible resources to build houses would be making a strong value-specific efficiency recommendation. Similarly, a hedonist who recommends that one use all available times and places for the maximally efficient pursuit of private pleasure would also be making a strong value-specific recommendation.

Because they are second-order norms, both weak and strong value-specific efficiency norms require supplementation by first-order efficiency recommendations in order to be applied in specific circumstances. Thus, one who makes a strong value-specific recommendation to another has not yet given any concrete advice that the latter can follow, even if the latter accepts the critic’s second-order norm. In order to make his efficiency analysis concrete the critic must describe a procedure that he claims is more efficient in terms of the favored objective.

What are the moral presuppositions grounding the use of value-specific efficiency norms? It is clear that such norms require a different kind of justification than value-nonspecific norms. Value-nonspecific norms presuppose only a belief in the general desirability of efficiency as such. Value-specific norms presuppose, in addition, a belief that a particular objective, other than the objective of promoting efficiency as such, is more desirable than competing objectives. That is, the particular objective in whose terms a certain value-specific norm is defined is ranked ahead of all other objectives that compete for scarce resources with the favored objective. It follows that justification of a particular value-specific norm requires justification of a value ordering which ranks the objective to which the norm is conceptually tied ahead of competing objectives.

It follows that an agent to whom a critic directs a value-specific recommendation will accept the recommendation only if he agrees with the critic’s valuation of the objective the critic is recommending. If the agent disagrees with the critic’s ranking of objectives he will be willing to pursue the critic’s favored objective only to the extent permitted by the objectives the agent prefers to the critic’s objective. In such a situation the agent will use his more
important objectives to define the boundaries within which the critic’s objective is permitted to operate. That is, the agent will admit the desirability of a particular objective only to the extent that the objective coheres with his own teleological orientation.

The controversial nature of a strong value-specific norm can be seen by noticing that such a claim really amounts to an assertion that a particular objective is a component of the intrinsic human good. What could be intended by a claim that a certain objective should be pursued at all times with maximum first-order efficiency other than the proposition that the favored purpose is intrinsically desirable in all possible situations, that it is part of the intrinsic good? Weak value-specific norms also presuppose claims about the intrinsic human good. One advocating a weak value-specific norm must at least assume that one’s favored objective is closely enough related to the intrinsic human good to warrant maximally efficient pursuit in all situations in which the purpose is being pursued.

It follows that the evaluation of a value-specific efficiency norm must be done on the basis of a general theory of the good. Since a value-specific efficiency norm constitutes a claim about the nature of the good, evaluation of the claim must also rely upon a theory of the good; evaluation of such norms inevitably takes one into the realm of philosophy. I shall argue that the standards of Pareto and Kaldor-Hicks efficiency are value-specific efficiency norms. I shall also argue that they are inadequate standards of the good and consequently are, by themselves, inadequate standards of evaluation for legal rules.

One of the incidental benefits resulting from making the distinction between first-order and second-order value-specific efficiency norms is the light that is shed on the noneconomist’s vague sense of discomfort at the economist’s continual use of the unqualified term “efficiency.” It is embarrassing to feel compelled from time to time to choose courses of action that are incompatible with what economists regard as “efficient.” How can one justify opposing “efficiency” under any circumstances? But when one realizes that economists are generally using second-order value-specific efficiency norms supplemented by first-order efficiency directives most of this discomfort should evaporate. Opposing the dictates of “efficiency” in a particular context is not at all comparable to opposing motherhood, the family or the flag. The economist is actually relying upon a particular theory of the intrinsic good in recom-
mending what he calls "efficiency" and his theory of the good is probably just as controversial as yours.

IV. THE UTILITARIAN CRITERION

The technical explications of the concept of efficiency that have been developed by economists are closely related to classical utilitarian principles. It is therefore useful to begin an analysis of efficiency by briefly examining these principles. I shall argue that in spite of the fact that the technical efficiency standards were designed to avoid perceived deficiencies in the utilitarian criterion the deficiencies have not been overcome. In particular, the epistemological problems raised by the need to make complex welfare calculations and the reliance upon a nonevaluative theory of the good are common to all such standards.

I understand the utilitarian standard to be the normative principle that, given a set of alternative courses of action, one ought to select that alternative which will maximize the total net sum of happiness of all persons whose welfare will be causally affected by the decision.²

Assuming for the sake of argument that the principle of utility should be used in adjudicative contexts, the question arises as to how it should be used. There seem to be at least three alternatives. First, one might suggest that courts should apply the criterion on a case-by-case basis. That is, courts should resolve the concrete disputes brought before them by applying the utilitarian standard directly to each conflict of interest; courts should not resolve cases by applying general rules. The judicial task should be one of ascertaining which outcome in any specific case would probably result in the greatest possible aggregate satisfaction of all individuals affected by the decision. Second, one might suggest that courts use the utilitarian test in choosing between alternative interpretations of a rule in situations in which the rule can be plausibly interpreted in more than one way. That is, although courts should resolve cases by applying general rules they ought to use the utilitarian standard in selecting the most justifiable interpretations of the rules. Third, one might contend that courts should use the principle of utility whenever they have an opportunity to create rules. A court should list all possible rules that could be used to resolve the question, determine the net aggregate welfare conse-

² See, e.g., J. SMART & B. WILLIAMS, UTILITARIANISM 4 (1973); see also C. DYKE, PHILOSOPHY OF ECONOMICS 30 (1981).
quences for the affected class of persons flowing from a general application of each rule and select that rule whose consistent application would yield the greatest net sum of welfare. I shall not deal with the question which alternative is the most plausible. I will argue that they are all subject to the same kinds of difficulties.

Critics of utilitarianism have often pointed to the alleged difficulty or impossibility of making the required welfare calculations. It is often charged that there is no coherent way in which the necessary interpersonal comparisons of welfare can be made, either on a cardinal or ordinal basis. But what is not often noticed is that one cannot intelligently deal with welfare measurement without first addressing the problem of characterizing the nature of welfare interests themselves. One cannot measure something without first understanding what it is one is to measure.

The concept of human welfare presupposes two more basic concepts, that of human desire and that of desire fulfillment and frustration. Having desires, conscious and unconscious, is an essential part of being human. Action is undertaken in pursuit of intentions which are grounded in desires. Any given desire is related to a course of action in one of two ways: either the desire is fulfilled, at least in part, by the course of action or it is frustrated to some degree. Well-being is the state of consciousness accompanying the fulfillment of a desire. Suffering is the state resulting from the frustration of a desire. The ultimate touchstone for the presence of well-being or suffering is immediate experience. There could be no test other than direct experience itself for determining whether one is experiencing well-being or suffering. It is true that often well-being or suffering is experienced on unconscious levels and that sustained self-consciousness may be necessary to become aware of their presence. But once their presence invades the realm of conscious awareness the only available criterion for their presence is immediate intuition.

There are at least three causes of frustration of desire. First, there is the case in which a desire is unfulfilled because of the state of the world external to the agent. The agent strives to fulfill a desire, but because of factors outside himself the desire is frustrated. For example, A desires to become a mechanical engineer. One week before entering engineering school war is declared by A's nation. A is conscripted into the army and killed in action.
Suffering caused in this way can be alleviated only by a change in the state of the world. Second, there is the situation in which the agent encounters frustration because of a personal inability or lack of power. For example, A desires to become a mechanical engineer. A takes the entrance examinations and although he tries to the best of his ability, he fails to score high enough to qualify for admission. Suffering caused in this way can be extinguished only by the agent’s acquiring the missing power. A third case is that in which a desire is frustrated because of the presence of another desire which conflicts with the first desire. The first desire can be fulfilled only at the expense of the second desire, and vice versa. To the extent that the second desire is fulfilled the first is frustrated and suffering results. Suffering caused in this case can be eliminated only by the agent’s abandoning or modifying one of the two conflicting desires.

Human well-being is a function of the relative presence or absence of all three categories of causal factors. Perfect well-being would be a state of consciousness in which no desire was frustrated by the state of the external world, no desire remained unfulfilled because of a lack of a power on the part of the individual and there were no mutually conflicting desires. This last condition is captured by the concept of integration. Integration is a state of the self in which there are no conflicting desires.

Presumably, the utilitarian standard presupposes such a concept of well-being. The recommendation of the principle of utility is that choices be made with the purpose of bringing about a state of affairs in which personal integration, coincidence of desire and power, and a matching of desire with the external world is maximized for the relevant group of individuals.

How is one to go about measuring welfare in this sense? The problem is one of fashioning a method for determining, for any one of a set of alternative choices, the consequences for the welfare of all persons whose lives are likely to be affected by the choice and for selecting the alternative whose welfare consequences are superior to any of the others.

This task, in turn, can be broken down into three components. First, one must be able to ascertain the causal consequences of an action for the range of choices available to other persons. Consider an action and a particular person whose well-being will be affected in some way by the act. Then one can classify the possible consequences of the act as follows. Some consequences may consist of
precluding certain options for the individual. Others will make available options unavailable. Some consequences may render certain options more or less difficult than they would otherwise be.

After ascertaining the causal consequences of an alternative in the foregoing sense one must be able to evaluate those consequences for an individual’s life in terms of his welfare. That is, after ascertaining that a particular course of action would have certain consequences for the range of options available to another, one must be able to determine what effect those consequences will have for one’s state of consciousness. In addition, one must have some method for ranking an entire set of alternative choices according to the degree to which each would promote the happiness or suffering of any particular individual.

These component tasks can be illustrated by imagining oneself legislating, in accordance with the utilitarian standard, for a single person. Given a legislative choice between members of a set of alternative rules one would have to be able to determine the probable consequences of each alternative for the subject’s range of options, and would then have to be able to evaluate each set of consequences in terms of one’s happiness and rank them according to their comparative degrees of production of welfare.

Finally, one needs a method of making interpersonal comparisons of welfare. Interpersonal comparisons are called for by the utilitarian standard because social choices usually require one to determine whether a benefit accruing to one person more than offsets a detriment incurred by another.

For example, imagine legislating for a society of two persons, where the legislative choice is between rules 1 and 2. Rule 1 would, if enacted, benefit the first citizen and harm the second, while rule 2 would benefit the second at the expense of the first. Unless a comparison of the true accrued benefit or harm to each individual can be made, no utilitarian standard can be applied.

I shall not discuss the problems involved in ascertaining the causal consequences for the range of options available to those whose lives will be affected by a choice. Whatever inherent difficulties there may be in making such predictions they are not unique to the utilitarian principle. Any principle of social choice which deems relevant the consideration of causal consequences of actions is forced to respond to the skeptic’s challenge that one is never sufficiently certain of causal consequences to warrant basing social decisions upon such predictions. And, in any case, a princi-
ple of social choice that refuses to consider probable causal consequences of alternative choices is simply irrational. Estimating causal consequences is often difficult and uncertain, but there is no reasonable way of avoiding it.

The second component task presents the problem of measuring welfare in the individual case. How should one go about measuring individual welfare? There seem to be at least three possibilities. First, one might ask the individual whose welfare will be affected by the decision which of the alternative choices would, in his judgment, result in the greatest satisfaction for him personally. Second, one might ask him the same question at some time in the future, after the prospective decision is made and the individual has had time to determine how his welfare has been affected. Finally, one might try to make the welfare assessment oneself, basing one’s determination upon one’s own theory of the good.

Consider the first method. Here, one asks the person whose welfare will be affected by the decision to imagine what desires he would pursue if he were given unlimited resources and liberty. If he is able to select one overriding desire, one asks him to repeat the thought experiment with the assumption that his first choice is unavailable. By means of a series of such thought experiments, the subject will construct a hierarchy of desires in order of descending subjective importance. One would then ask him to rank the alternatives available to the decisionmaker in terms of their likely causal effects upon the desires in that hierarchy. Presumably, this will enable him to rank the alternative choices according to his own preferences. I shall refer to this method of determining welfare as a nonevaluative or subjective method because it is tied exclusively to the subjective evaluations of the good of the individual himself and does not require the person applying the method to evaluate the moral worth of the other’s conception of the good.

In the case of legislating for one person this method would make the utilitarian standard operational. One would not need a cardinal measure of utility. Asking the person whose welfare will be affected to rank the alternatives constitutes by itself an ordinal ranking of those alternatives. Selecting the alternative which the person prefers achieves the maximization of welfare, as measured by a nonevaluative criterion.

One of the weaknesses of a nonevaluative criterion is that the individual, A, whose welfare is at stake may not always be the best judge of his own interests. When this is so a nonevaluative crite-
rion will lead to counter-intuitive results. For example, suppose that one of the legislative alternatives is the legalization of heroin and suppose that A has a strong propensity for addiction. A might prefer the legalization alternative but that might not be in his own best interests. Such examples tend to show that a nonevaluative criterion cannot be the sole touchstone for social choice. If used at all it must be supplemented by another standard of welfare.

In order to correct this deficiency one might look to the second welfare measure mentioned above, viz., that of ascertaining the preference ranking of the individual whose welfare is at stake after he has had time to verify for himself the welfare consequences of the social choice that was made. Such a ranking might be different from the ranking the subject would have proposed at the time the choice was being contemplated and may be more consistent with his best interests. This measure obviously cannot assist in making the social choice itself, for it works, if at all, only after a decision has been made and after the subject has verified for himself the welfare consequences.

The third welfare measure looks to the decisionmaker's theory of the good rather than to the subject's theory. This measure will not lead to the kinds of counter-intuitive results the first method generates, at least when the decisionmaker is better able than the subject to ascertain the subject's best interests. But does not this observation constitute a decisive objection to the third measure? Is it not intolerable arrogance for the decisionmaker to presume that he knows A's best interests better than A himself?

This appearance of unfairness can be lessened by making certain assumptions. Suppose that the decisionmaker consults A prior to making his decision in order to discover A's preferences. The decisionmaker is committed to going along with A's preferences unless he is justifiably convinced that A's preferences in a particular context are not in A's best interests and that more good than evil will be produced by refusing to accede to A's preferences. A has participated in the selection of the decisionmaker and has consented to entrust him with the necessary political power to make social choices that will affect A's well-being. Both A and the decisionmaker subscribe to a political philosophy which asserts that the common good can best be promoted by a division of labor under which specific persons are assigned the role of systematically
reflecting upon the conditions of the common good. Finally, suppose that A and the decisionmaker share a common human essence in the form of common fundamental desires, that both understand this, that the decisionmaker has self-knowledge of at least some of these basic needs, that he desires to promote them in A’s case and that A understands this. If these conditions are satisfied then the situation proves fairer than a first impression might suggest. Whether these conditions are satisfiable is a controversial and important question of political philosophy.

I shall refer to the third measure of welfare as an evaluative or objective criterion of welfare. It might be objected that this method is just as “subjective” as the first. Do not both depend on the subjective preferences of individuals? Although this is true there is a sense in which the third method is objective and the first is not. The third method assumes the existence of an intrinsic human good common to all persons. That is, it assumes that certain modes of being and certain resources are necessary for human well-being. The first method assumes that the good varies from individual to individual and that there exist no common measures for it that are intersubjectively valid.

The choice between a social-choice standard based upon a nonevaluative theory of the good and one based upon an evaluative theory becomes even more significant when the absence of alternatives is recognized. That is, if a society decides that coercive adjudicative power must be placed in the hands of certain individuals, then such power must necessarily be exercised on the basis of one of the two theories. The choice is not between giving courts coercive power to effect their personal theories of the good and refusing to give them coercive power at all. The choice is rather between two uses of coercive power. In the one case courts will exercise coercive power on the basis of an evaluative theory of the good. In the other they will exercise the same coercive power but on the basis of a nonevaluative theory. The interesting question is: Upon the basis of which conception of the good is this kind of coercive political power best exercised?

The contrast between the subjective and objective methods of measuring welfare can be made clearer by considering the third component task, viz., that of making interpersonal comparisons of welfare.

4. For a profound analysis of this concept, see Y. Simon, A General Theory of Authority (1980).
Before attempting to make the distinction in the interpersonal context it may be helpful to briefly review the distinction between cardinal and ordinal measures of welfare. A cardinal measure of welfare for a specific individual would be defined by the specification of a set of criteria or procedures for answering the question, "How much (in terms of units) happiness or unhappiness is this individual experiencing in any given situation?" Such a set of criteria would include: 1) a quantitative standard unit of happiness or welfare and 2) a method for locating a zero point in order that negative levels of welfare could be counted. A cardinal measure of welfare applicable in the interpersonal context would be defined by the specification of a common unit and zero point applicable to all persons. The question whether such a measure is feasible is irrelevant for my purposes because I do not believe the utilitarian program needs a cardinal measure. The utilitarian standard can be applied by means of an ordinal measure of welfare.

In outline, this method would work as follows. For any given social choice the decision-maker would first list all the alternative choices. For each one, he would determine the set of causal consequences together with the set of associated welfare consequences. He would then survey the total set of sets of welfare consequences and rank them in terms of desirability. Finally, he would select the alternative whose welfare consequences outranked the others.

That such procedures are possible can be seen by reflecting upon everyday situations in which we intuitively apply them. Imagine a parent with three children trying to choose between several vacation alternatives. Presumably the parent is generally familiar with the preferences of his children concerning vacation activities. One prefers swimming to all other activities, fishing next, hiking next, etc. The other children have somewhat different rankings. It seems undeniable that a sensitive parent can make at least a rough ordering of the alternatives in such a way as to select that one which will yield the greatest amount of happiness for the family. Such an ordering can be made without recourse to any cardinal measure of welfare. It may be theoretically unclear how we are able to make such orderings but the fact that we can and do make them seems certain.

It might be thought that the only requisites for an ordinal measure of interpersonal welfare are the following: (i) a method for

6. For a similar argument, see J. Smart & B. Williams, supra note 2, at 32-33.
determining, for any two alternative states of consciousness of a given individual, whether the first state is greater than, less than, or equal to the second in terms of happiness; and (ii) a method for determining, for any two given individuals, A and B, whether a given state of A's consciousness is greater than, less than, or equal to a given state of B's consciousness in terms of happiness. That is, it might be thought that these two conditions are sufficient for constructing an ordinal measure of interpersonal welfare and that the insistence upon a method for linear ordering of total welfare complexes is unjustified. These conditions alone will not suffice. To see this, imagine a society of two members, A and B. Suppose that the social choice is between State 1 in which A would be happier than B, and State 2 in which B would be happier than A. Suppose also that we somehow have the following information concerning the relative cardinal measures of welfare for A and B under both alternative states:

<table>
<thead>
<tr>
<th>State 1</th>
<th>State 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>A₁ = +25</td>
<td>A₂ = -12</td>
</tr>
<tr>
<td>B₁ = -10</td>
<td>B₂ = +30</td>
</tr>
<tr>
<td>+15</td>
<td>+18</td>
</tr>
</tbody>
</table>

Now we know that given the assumed information concerning cardinal utilities the Principle of Utility would select State 2 because that alternative yields the greatest net sum of welfare. But if we had only the ordinal information mentioned above we would know only the linear order of relative welfare states: B₂ > A₁ > B₁ > A₂. But this information does not suffice for recognizing that State 2 ought to be selected. We would need, in addition, a method for ordinally ranking the total welfare consequences of each member of the set of alternatives. This is just what I have argued.

Does our intuitive ability to make such interpersonal comparisons of overall welfare consequences mean that there are no insurmountable difficulties inherent in the utilitarian program for adjudication? The answer depends in part upon whether the utilitarian standard is applied with an evaluative or nonevaluative theory of the good.

Imagine what a conscientious court would have to do in order to apply the utilitarian standard with a nonevaluative theory of the good. It would first have to determine the identity of the class of persons whose welfare would likely be affected by whatever decision is made. The identity of this class will depend, in part,
upon which of the three alternative ways of using the utilitarian standard in adjudicative contexts is chosen. The class of individuals affected by the adoption of one legal rule rather than another, or by the selection of one interpretation of a rule rather than another, will tend to be much larger than the class of persons whose welfare will be affected by a particular judgment. But whichever alternative is selected, certain assumptions about the likely causal consequences of each of the alternative resolutions of the legal issue will have to be made. Unless the court can do this, it will not be able to identify the class of persons whose welfare is at stake. I have already argued that this kind of causal reasoning is an inherent part of any adjudicative method that looks to the probable consequences for human welfare of judicial decisions. Difficulties inherent in ascertaining such causal consequences or in identifying the class of persons whose welfare is at stake are not peculiar to the program of using the utilitarian standard with a nonevaluative theory of the good.

The court's second task is more difficult. The court would have to ascertain the subjective preference rankings, as of the time of adjudication, of each member of the class likely to be affected by its decision. Until this is done the court will not be able to make a linear ordering of the total welfare consequences of each alternative. It is doubtful that courts are capable of this, at least in the vast majority of cases. It is one thing for a sensitive parent to make linear welfare orderings based upon his intimate knowledge of his children's preferences. It is quite another for a court to do the same with respect to a large class of persons who are, for all practical purposes, strangers to the court.

As an illustration, consider some of the ways in which such determinations of the subjective value preferences might be made. The ideal presumably would be to provide psychoanalytic sessions for each member of the class. There are several reasons for preferring this method to a simple interview or questionnaire technique calling for the individual to rank in order of personal preference the alternative legal resolutions of the issue. One would be more assured of avoiding failures of linguistic communication, both with respect to the questions asked and the responses of the subject. One would be better able to elicit the true preferences of the subject by seeing whether there was any discrepancy between what the subject says he wanted and what he really wants. This would facilitate a determination of the relative intensities of the
subject’s preferences. Obviously, this method is not feasible. Aside from the barriers of time and expense there would be serious procedural, jurisdictional and constitutional problems.

A poor second best would be to provide for single interviews with each class member. The interviewer would present the subject with a list of the alternative resolutions of the lawsuit and ask him to order them on the basis of his own preferences. The interviewer would also try to elicit from the subject judgments about the relative intensities of his preferences because the court will ultimately have to make a total welfare ordering on the basis of these interviews. This method would be subject to the same difficulties as the first and have none of its quantitative advantages. The same can be said for a third alternative—that of simply mailing out questionnaires.

If the court does not try one of the foregoing methods, it relegates itself to speculating blindly about individual preference rankings and their relative intensities. This entails abandoning any pretense of applying the utilitarian standard with a nonevaluative theory of the good. Consequently, unless some method is available for eliciting the actual preferences and their intensities from those whose welfare will be affected by the adjudication, an evaluative criterion is being utilized.

In contrast, a court applying the utilitarian standard with an evaluative theory of the good would be in a stronger methodological position. Like a court applying a nonevaluative theory, it would first try to ascertain the identity of the class of persons whose welfare would be affected by the decision. Once this class is identified, however, the court would place its ultimate reliance upon its own theory of the good. That is, it would seek that resolution which, in its own best judgment, would lead to the greatest amount of human welfare, where the standard of welfare is internal to the court rather than to the members of the affected class. Of course, a conscientious court will deem relevant whatever it can discover about the subjective preferences of the class members, but it will not regard those preferences as controlling. It will make the final decision on the basis of its own conception of the intrinsic good and the best means, under the particular circumstances, of maximizing that good. The court can accomplish this task by regarding itself as a mirror or microcosm of the legitimate needs of the larger society. This would require the court to imaginatively place itself in the various situations occupied by persons likely to be affected by its decision and to
To summarize the discussion thus far, I have distinguished the use of the utilitarian standard with a nonevaluative theory of the good from its use with an evaluative theory. I have pointed to some of the methodological problems inherent in the nonevaluative kind of application and have argued that such difficulties are insurmountable in adjudicative contexts. I will now argue that even if these methodological problems were solvable, the nonevaluative use of the utilitarian standard in adjudication is unjustifiable for substantive reasons.

Certain implications of the nonevaluative use of the utilitarian principle are morally objectionable. As a simple illustration, consider a three-member society comprised of A, B, and C. Make the following assumptions: that A hates B and is indifferent to C's welfare; that the legislative problem is one of allocating a national product of $21 among these three; that we have already allocated all but the last dollar of income, with A receiving $10, B receiving $5 and C receiving $5; that the last dollar would bring B 10 units of welfare and C 5 units; and that in virtue of A's hatred for B, A would incur 100 negative units of suffering at seeing B get the last dollar. If we take into account the welfare consequences of A's hatred for B, as we are required to do by the nonevaluative standard, then the last dollar should go to C, despite B's greater welfare from that dollar. The basis of one's intuitive protest against such an implication is directed against the very inclusion of A's hatred in the welfare calculation. It seems morally misguided to take into account A's desire for B's suffering. And yet we must, if we are to be faithful to a nonevaluative standard of well-being, consider A's pernicious desires. Behind this distaste is doubt about the truth of the nonevaluative assumption that satisfying A's desire for B's suffering will bring genuine fulfillment to A. This doubt is an example of our more general conviction that satisfaction of certain kinds of human desire fails to lead to genuine well-being.

This disbelief in the underlying assumption of the nonevaluative criterion leads to more specific objections. First, insofar as the nonevaluative utilitarian purports to promote those conditions which maximize genuine human fulfillment, he must inevitably fail whenever confronted with human desires whose satisfaction will ultimately lead to suffering rather than fulfillment. The nonevaluative utilitarian is engaged in a self-defeating enterprise.
Apart from the incompatibility of the nonevaluative criterion of the good and the utilitarian objective, such a moral standard misses the fundamental point of the moral quest, that of seeking the conditions of the truly fulfilling human life. If the purpose of moral reflection is to ascertain the nature of the intrinsic good and its necessary or useful conditions, then the nonevaluative criterion cannot possibly help. The proof is that in situations such as the one presented above, the criterion recommends maximizing genuine well-being by fulfilling desire to see others suffer. Our moral intuition tells us otherwise.

A related consideration is our intuitive rejection of the idea that it is morally justifiable to cause one person to suffer as a means of fulfilling another’s desire, when the suffering fails to promote the latter’s genuine well-being. The presupposition of this objection is the belief that the only morally legitimate reason for harming a person is the promotion of the genuine well-being of another. This is not to say that such a purpose always justifies harming an individual. But it is to say that harming a person is morally justifiable, if at all, only in the case where it is the only way of promoting another’s true well-being.

Note that the utilitarian principle, whether used with an evaluative or nonevaluative standard of the good, is a value-specific efficiency norm. It is value-specific with respect to the objective of maximizing human welfare. In addition, since it purports to be sufficient for all moral issues it is a strong value-specific efficiency norm. A strong value-specific norm is only as justifiable as its value-specific objective. That is, only insofar as the objective constitutes an adequate theory of the good is the standard sufficiently comprehensive. Thus, the criticism I have been making of the nonevaluative use of the principle of utility can be equivalently rendered as the claim that this kind of strong value-specific efficiency standard is intrinsically inadequate to the task of doing justice to our moral intuitions.

In light of the methodological and substantive difficulties inherent in the nonevaluative use of the utilitarian standard, one might well ask whether utilitarians should apply their standard with exclusive reliance upon an evaluative theory of the good. I believe that utilitarians, in general, would be unwilling to do so. One of the primary motivations behind utilitarianism is the development of a scientifically respectable method for evaluating social norms. Utilitarians would like a method for lifting social theory from the morass of philosophical uncertainty and
controversy inherent in traditional natural law approaches. In particular, they would like a philosophical principle that would avoid the need for debating the nature of the objective human essence and the objective human good. They would like to substitute this traditional Platonic-Aristotelian concern for the human essence with a method looking only to the subjective value preferences of those who will be affected by social choices. If one does not have to concern oneself with the question, "What is the truly good way to live?", then one can, so the argument goes, put social theory upon a scientifically firm foundation. One can be content with the practical problems of ascertaining the nature of persons' immediate value preferences and seeking ways to maximize their satisfaction, whatever they turn out to be. Insofar as this is an accurate characterization of the primary impulse behind the utilitarian program, it seems unlikely that utilitarians would be willing to apply their standard on the basis of an evaluative theory of the good. For a utilitarian, this would be a retreat to the kind of natural law philosophizing Bentham was attempting to avoid.

These reflections lead to the question of whether there is a significant difference between a utilitarianism based upon an evaluative theory of the good and the natural law approach. In order to answer this question, we must look briefly at the structure of natural law theory. 7

Natural law theory incorporates theories of both the individual and the common good. With respect to the individual good, natural law theory is an ethic of perfectionism or self-realization. It understands the ultimate meaning of human life as the progressive realization of essential human powers. Realization of these powers and capacities yields the maximum measure of well-being that is attainable in the human condition. The essential powers are grounded in fundamental desires which can be fulfilled only through action. Thus, the intrinsically good human life is one of activity, of manifested power, in which essential capacities are continually realized. The basic criterion of right for the individual is to do those things which realize his essential powers. Practical

reason is the power to reflect upon the nature of the intrinsic good and the best means of promoting it in particular circumstances. The concept of practical reason is not narrowly prudential; some of the intrinsic desires are genuinely other-regarding.

Supplementing the theory of the individual good with a theory of the common good is necessary because the essential human powers of the individual are fully realized only in a social context where persons cooperate and share. The common good is not an entity, but a set of activities and practices. In particular, it is constituted by a complex of activities and practices which work together to promote the self-realization and fulfillment of each participant. The good is “common” because in some sense it benefits every participant in some way and measure. Any purportedly adequate theory must take into account at least three dimensions or levels of the common good. These dimensions can be delineated by distinguishing between three kinds of interpersonal relationships available in a social context.

First, there is the situation in which two or more persons are engaged in their respective activities and each refrains from affirmatively interfering with the activities of the others. In this case each person is able to pursue individually his chosen activity just as efficiently as he is doing in the midst of the others. The relationship to the concept of the common good arises from the fact that each individual could, by virtue of his very presence, affirmatively interfere with the activities of the others and chooses not to do so. In such a context each participant can desire the others’ fulfillment as an end in itself and not merely as a means to his own fulfillment. But regarding the fulfillment of the others’ desires as an intrinsically desirable end is not a necessary condition for the realization of the values that each is pursuing.

The second kind of situation is one in which the goods pursued by each individual would not be attainable, or at least would not be attainable to the same extent, without the affirmative cooperation of the others. The activities of all others constitute affirmative conditions, either necessary or useful, for the realization of the good on the part of each participant. Obvious examples are the individual gains that can accrue through division of labor and voluntary exchange in markets. Again, although the participants may have genuinely other-regarding desires such desires are not necessary conditions for the realization of the goods each is pursuing.
Finally, there is the situation in which having genuinely other-regarding desires is a necessary condition for achieving the goods each participant seeks. This category, in turn, divides into two subcategories. In the first, A’s having a genuinely other-regarding desire for B’s fulfillment is a necessary condition for the realization of the good A seeks. In the second, it is necessary for the realization of A’s good that A have an other-regarding desire for B’s fulfillment, that B have an other-regarding desire for A’s fulfillment, and that A knows the latter fact. An example of the first subcategory is anonymous giving. An example of the second is the mutual self-giving of a deep friendship.

Consequently, in each dimension of the common good various modes of good (both intrinsic and instrumental) arise through the interaction of the members of the social order as that interaction is manifested in their activities and practices. It is important to note that these distinctions are keyed to the specific kinds of goods that the participants are seeking. That is, the criterion of individuation is based upon the specific mode of good at issue. Thus, the second category is sufficient by itself to describe a social context in which the participants are seeking only goods that do not depend upon other-regarding desires. But if they seek goods that do so depend then one must invoke the third dimension of the common good. The dimensions are not mutually exclusive, depending upon the goods pursued by the participants. For example, a market interaction can be adequately analyzed as an instance of the second dimension of the common good if the participants are not pursuing goods which depend upon genuinely other-regarding desires. If they are pursuing such goods, then the third dimension of the common good is invoked.

All three dimensions of the common good are rooted in the human essence, that is, rooted in basic human needs. The first two dimensions do not require any theory of human nature stronger than the Hobbesian picture. The third dimension, however, presupposes a human essence which includes genuinely other-regarding desires. The modes of good made available by the third dimension are “common” in a very strong sense; the relationship between the goods sought is not contingent or accidental, but is necessary. An intrinsic aspect of each participant’s fulfillment is witnessing and contributing to the fulfillment of the others.

A complete natural law theory of the common good would incorporate at least two elements. First, it would articulate the nature of the personal goods realizable in common and the nature
of the practices that make such goods available. Second, it would
present a theory of the conditions which make such practices
possible. The latter theory would incorporate an account of the
practices which can be promoted by collective coercive action
through the legal system and distinguish them from practices that
are best promoted through nonlegal means. It should not be
inferred from my stress upon evaluative standards that a natural
law theory of the common good is authoritarian or totalitarian in
tendency. Great weight is placed upon the value of uncoerced
choices. But this valuation of human freedom does not blind the
tradition to the necessity and importance of collective action with
respect to the promotion of those elements of the common good
that are best promoted in coercive ways, given the conditions of
the human situation.

For natural law theory the only morally justifiable role for
government is the creation and promotion of those conditions that
are either necessary or useful for the free self-realization of the
essential powers of its citizens. This general principle, however, is
subject to the qualification that only some of the conditions of the
common good can be usefully promoted at the level of the
organized state.

The basic difference between a natural law theory of the
common good and utilitarianism with an evaluative theory of the
good is that natural law theory advocates maximizing equal
conditions for maximum self-realization on the part of concrete
individuals whereas utilitarianism recommends maximizing
aggregate welfare. In a sense, utilitarianism looks to aggregate net
welfare as if it were the subjective experience of one superhuman
individual and as if the moral objective were the maximization of
utility for that single supreme consciousness. The touchstone for
natural law theory is the finite human consciousness as the
intrinsically valuable concern of morality. If we had access to the
consciousness of the supreme individual then perhaps there would
be no difference between evaluative utilitarianism and natural law
theory. One of the consequences of this difference is that natural
law theory tends to impose Kantian-like constraints upon the
consequentialist tendency of the teleological method, whereas
utilitarianism is more likely to give the consequentialist principle
unlimited freedom.

Thus, there is a sense in which natural law theory treats
individuals with a greater measure of equal respect and concern
than does utilitarianism. Under the utilitarian approach,
individuals with higher marginal utility curves than others tend to get relatively favorable treatment. There is no such built-in bias under the natural law approach. Of course, if an evaluative utilitarian assumes that all persons have equal marginal utility curves, then the differences between utilitarianism and the natural law approach would be fewer. But that is a very strong, and probably false, assumption. It does not seem to be charitable to saddle the utilitarian with it by definitional fiat.

In addition to these differences there is a difference in style which seems to reflect a dissimilarity in basic attitude toward the human dimension. This difference is obscure, and therefore difficult to articulate, but important. One might characterize it as a difference in the metaphysical or spiritual tone of voice used in describing the purpose of moral reflection and the human essence. The language used by the utilitarian in framing and applying his standards suggests images that belittle the human essence. There is a peculiar quality of coldness and detachment (and perhaps implicit contempt) between the lines of the prose of a Bentham. The utilitarian has "understood" the human condition and trivialized it in the process. There is something about the very language of maximization as used in utilitarian discussions that induces in the reader a vague sense of flatness, of disillusionment, a feeling that we have been shown to be nothing but one-dimensional pleasure maximizers with no metaphysical complexity, no relationship to the mystery of being, no openness to the transcendent. I believe that at least part of the reason for this is that talking about "maximizing" a variable attribute (viz., welfare) in quantitative terms suggests that the process and goal of human existence can be adequately described in mechanical or physical terms, for it is only physical attributes such as length and weight that can be measured in the clearest sense. This, in turn, suggests the image of the human as a machine. This language encourages us to picture the ultimate evaluation of a human life as analogous to measuring the temperature of a physical substance or the resistance in an electrical coil. The language marries mathematics and Newtonian physics so as to preclude us from seeing ourselves as beings with depth, mystery and complexity. The reason that it is important to call attention to what may seem to be only a matter of literary style is that the very language a

philosopher uses in characterizing the human condition tends to alter his perception and therefore his understanding of that condition. If our linguistic imagery is inadequate to call our attention to certain fundamental dimensions of the human order, then that language is detrimental to the philosophical objective of understanding reality. The language of natural law philosophy is not mathematical or mechanical in tone. It is, in a sense, vaguer, more poetic, or what some might call "thicker." I do not regard this as a defect. If the human essence does partake of mystery and depth, then the philosophical language we use in characterizing ourselves ought to reflect that depth. Here one is reminded of Aristotle's remark about the proper mode of philosophizing about ethics: "Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts." A similar point could be made concerning the Pareto and Kaldor-Hicks standards, which are examined in sections V and VI.

V. PARETO EFFICIENCY

Those attracted by the relativistic program of subjectivistic utilitarianism but skeptical about the feasibility of making interpersonal comparisons of welfare might well adopt the concept of Pareto efficiency as an evaluative standard. For, while based upon a nonevaluative standard of the good, the Pareto criterion does not rely upon interpersonal comparisons. The Pareto standard is defined by the concepts of Pareto-superiority and Pareto-optimality.

Social state A is Pareto-superior to social state B if and only if at least one person whose well-being will be affected by the choice prefers A to B, and every other person affected by the choice either prefers A to B or, at worst, is indifferent. Social state A is Pareto-optimal if and only if there is no alternative social state that is Pareto-superior to A. Alternatively, social state A is Pareto-optimal if and only if it is impossible to move to any state other than A without making at least one person worse off in his own mind under the alternative than he would be under A.

11. Id.
Two standards of social choice are derivable from the foregoing concepts. One is the rule that, given a social state A which is not Pareto-optimal, the legal system should always move toward a state that is Pareto-superior to A. The second standard is the rule that, given a Pareto-optimal state, the legal system is never justified in moving to an alternative state. These two rules can be combined in a single directive: Always move in the direction of Pareto-superiority and never move in any other direction.

One of the immediate problems of interpretation is that of determining the appropriate level at which these standards should be applied. Consider the first standard in this regard. There are at least three possible ways in which it might be used in adjudicative contexts.

First, it might be applied on a case-by-case basis. A court would try to determine whether there is any resolution of the dispute which the litigants, and all others whose welfare is likely to be affected by the outcome, would prefer to every alternative resolution. The Pareto criterion would not be used to evaluate alternative rules at all, but would supplant existing rules and be itself the sole touchstone for adjudication.

The difficulty with this method is that the criterion would rarely, if ever, be satisfied. The very fact that a conflict of interest finds its way into the judicial system implies the improbability of any resolution that is Pareto-superior to all alternative resolutions. This certainly would be the case for the litigants and it is likely to be true for all others whose welfare will be affected by the outcome. Consider a lawsuit with a single plaintiff and a single defendant. The court has at least three alternatives: (1) deny the plaintiff's claim, (2) give the plaintiff only a portion of the relief sought and (3) give the plaintiff the full relief sought. For the plaintiff, alternative (3) is Pareto-superior to (2), which, in turn, is Pareto-superior to (1). For the defendant, alternative (1) is Pareto-superior to (2), which, in turn, is Pareto-superior to (3). Thus, there is no choice that is Pareto-superior to all others for the litigants; a fortiori, there will be no such alternative for the class of all others whose welfare will be affected by the outcome because each of them will be sympathetic with one or the other of the litigants.

The first Pareto-criterion could also be used as a standard for evaluating alternative legal rules or general ways of resolving particular kinds of legal disputes. This method of use can, in turn, be broken down into two more particular modes.
One would consist of looking for rules that, when applied on a case-by-case basis in the future, invariably yield outcomes that were Pareto-superior to all other possible outcomes. This proposal is even less feasible than the first. There are no rules that could satisfy the standard. No matter what rule is formulated for resolving a particular kind of issue, conflicts of interest will inevitably form around it in practice because the rule's application will be in one person's interest and opposed to another's.

Another mode of use would require the court to list the alternative rules that could be used to resolve the issue. It would then try to determine which of the alternative rules would be preferred by each member of the class of persons whose welfare will likely be affected by the choice. In order to avoid the problems of the preceding method the court would have to imagine each member of the affected class asking himself which of the alternative rules he would prefer prior to becoming involved in any legal dispute to which the choice of rules would be relevant. But even this standard would never be satisfied. Given differing kinds of economic and moral interests, differing degrees of understanding of legal issues, and differing political philosophies, there could not be a rule Pareto-superior to all alternatives for the resolution of any particular kind of issue.

These considerations add up to a major criticism of the first Pareto criterion. The criterion is useless because it can never be satisfied. A minimum condition for an adequate standard of evaluation for legal rules is that the standard be applicable to the kinds of choices courts must make. The first Pareto criterion does not satisfy this condition.

A second major difficulty with the first Pareto criterion is that of ascertaining the preferences of the members of the affected classes. The criterion is usable only insofar as courts are able to determine those preferences and implement the criterion. There seems to be no reasonable substitute for asking the members of the class about their preferences. Yet interviewing each member would present insurmountable problems of time and expense. Recourse to the proposal that courts simply rehearse in imagination the "likely" preferences of each person concedes defeat. The first Pareto criterion purports to rely upon the actual preferences of affected individuals. If courts have no reliable access to those preferences, the criterion is being used in name only.

Even if courts had workable methods for ascertaining the prefer-
ences of affected classes, there would be great difficulties in formu-
lating the alternatives in ways that the public could understand. 
Presumably, the Pareto criterion should be applied on the basis of 
informed choices. Yet, eliciting informed judgments from the pub-
lic with respect to complex choices between alternative rules would 
require prior public education.

Another problem is that of selecting the class whose preferences 
should be ascertained with respect to any particular choice. In 
order to be consistent with the subjectivist spirit of the Pareto cri-
terion it seems that the only proper way to identify this class is by 
asking every citizen whether he wants to have his preference rank-
ing registered with the court. For the court to take upon itself the 
task of identifying the class of persons whose welfare will likely be 
affected by a decision would depart from the Pareto objective of 
basing social choices upon the actual preferences of the public. 
The question whether a particular individual's welfare will be af-
affected by a social choice is itself a question that can be resolved 
consistently with a subjectivist standard of the good only by asking 
him whether he thinks his welfare will be affected. If he thinks it 
will be affected then it will be affected. Thus, each time a court 
attempted to apply the first Pareto criterion it would have to poll 
the entire population.

But, as with the nonevaluative use of the utilitarian standard, 
the most serious difficulty with the first Pareto criterion is moral. 
Not all Pareto-superior alternatives are morally justifiable. As 
with subjectivist utilitarianism the reason for this moral defi-
ciency is that an individual's conscious preferences are sometimes 
inconsistent with his true welfare. To the extent that false con-
sciousness is part of the human condition, the first Pareto criterion 
will lead to morally unjustifiable choices.

One might object that if the first Pareto criterion were satisfied 
in a particular case there would be no possibility of even asking the 
question whether the Pareto-superior alternative is morally justifi-
able. If all whose welfare is likely to be affected by a choice prefer 
A to B, or are at worst indifferent, there would be no one to raise a 
moral objection. This overlooks the proper role of the adjudicat-
ing court. Presumably, the Pareto criterion is not intended to take 
into account the preferences of the decisionmaker himself; the 
whole point is to avoid the necessity of relying upon the moral 
judgments of the decisionmaker. Given this assumption, the pref-
erences of the adjudicating court have not been taken into ac-
count. The court itself remains as a source of moral knowledge.
Like subjectivistic utilitarianism, the first Pareto standard is a strong value-specific efficiency standard. It advises taking every opportunity to maximize, with all possible first-order efficiency, the number of legal rules for which there is unanimous consent while always excepting the preferences of the adjudicating court itself. It follows, then, that to the extent the first criterion rests upon an inadequate theory of the good, it cannot suffice as the sole moral touchstone for evaluating a legal system. And that it rests upon an inadequate theory of the good follows from its use of a nonevaluative theory of the good.

Let us briefly review the second Pareto criterion, which dictates that, given a Pareto-optimal state, one is never justified in moving the legal system to an alternative state. This standard is subject to the same methodological problems as the first Pareto standard. Courts would have to identify the relevant classes and would have to ascertain the preferences of their members.

In addition, the standard would always be satisfied. Given any proposed modification of the law, one could always find at least one person who would object. As a result there would never be any justification for modifying the law at all. This consequence conflicts with our moral intuition that the degree of correlation between any historical legal system and a morally ideal system is less than perfect.

The most fundamental defect of the second Pareto standard is that it would bar the movement to morally preferable states of affairs. Consider a situation in which it is illegal for a certain racial group to own real property. So long as there are citizens who regard the continuance of this legal prohibition to be in their own interests the rule will remain. The existing state of affairs is Pareto-optimal. This, however, contradicts our moral intuition. Again, this deficiency is the consequence of the Pareto standard’s reliance upon a nonevaluative standard of the good. The second Pareto criterion is a strong value-specific efficiency standard which advocates the maximization of the number of Pareto-optimal legal rules, and whose use of a nonevaluative theory of the good entails its inadequacy as a moral standard.

In summary, neither Pareto criterion is a morally adequate standard of social choice. The basic reason for this failure is that both make the mistake made by subjectivistic utilitarianism, viz., assuming that for purposes of evaluating alternative social choices all one need know are the conscious preference rankings of the mem-
bers of society. This would be morally adequate only if the conscious preferences of individuals were always consistent with their, and others', true well-being.

VI. KALDOR-HICKS EFFICIENCY

The concept of Kaldor-Hicks efficiency was introduced in order to remedy what some economists believed to be the major weakness of the Pareto standard, viz., its general inapplicability. A test of efficiency was sought which would assist in making choices among alternatives each of which burdens some and benefits others. The Pareto standard is useless in situations requiring a balancing of burdens on some against benefits for others. If there is no available alternative which does not burden at least one individual, and this is the usual case, then there cannot be any Pareto-superior alternative.

The concept of Kaldor-Hicks superiority is definable as follows: Suppose there is a social choice situation. Let A be the existing state of affairs and let B be an available alternative. B is *Kaldor-Hicks superior* to A if and only if, after a change from A to B, those who believe themselves to have benefited from the change are willing and able to adequately compensate those who believe themselves to have been harmed by the change, and something is left over in the way of subjectively perceived benefits. Where there is more than one available alternative, say B₁, B₂, B₃, . . . , Bₙ, which is Kaldor-Hicks superior to the existing state of affairs, A, the Kaldor-Hicks efficient choice is that alternative, Bᵢ, under which those who would believe themselves to have benefited by a change from A to Bᵢ would be left with a greater net balance of benefits after compensating those who would regard themselves as having been harmed by a change from A to Bᵢ, than under any of the other Kaldor-Hicks superior alternatives. The concept of adequate compensation is tied to the judgments of those who believe they would be harmed by a particular choice. That is, it is the persons who regard themselves as likely to be harmed by an alter-


native who determine what would be required for adequate compensation in any particular instance. Despite the fact that the concept of adequate compensation is central to the standard of Kaldor-Hicks efficiency, that standard does not require that compensation be actually paid. The criterion can be satisfied by purely hypothetical compensation.\(^\text{14}\)

As with Pareto efficiency, the Kaldor-Hicks standard can be used as a basis for two different directives: (1) Take every opportunity to move to a Kaldor-Hicks superior state of affairs, and (2) Never move to a state of affairs which is not Kaldor-Hicks superior to the existing situation. I shall refer to these two directives as the first and second Kaldor-Hicks standards. Again, as with Pareto efficiency, Kaldor-Hicks efficiency can be applied by courts either on a case-by-case basis or on the level of the evaluation of alternative rules.

A court applying the first Kaldor-Hicks standard on a case-by-case basis would proceed as follows: It would list the alternative ways of resolving the case. It would then ascertain, for each alternative resolution, the class of persons who would regard themselves as benefiting from that resolution and the class of those who would regard themselves as harmed. These classes would not necessarily be restricted to the litigants unless, in a particular case, all other persons were indifferent to the outcome. It would then determine the net dollar equivalent, if any, the gainers would be left with in the way of benefits over and above the sum the losers would insist upon as adequate compensation. Finally, the court would resolve the case by selecting that method of resolution which would result in the largest net dollar gain.

A court applying the first Kaldor-Hicks standard on the level of rule evaluation would proceed in either of two ways. First, the court could begin by listing the alternative rules that could be used to resolve the issue. It would then ascertain, for each alternative, the class of those who would regard themselves as benefited by the rule and the class of those who would regard themselves as harmed. It would then determine the net dollar amount, if any, that the gainers would be left with in the way of benefits over and above the sum the losers would insist upon as adequate compensation for the harm of being compelled to live under a rule they oppose. Finally, the court would select that rule which would re-

\(^{14}\) See, e.g., W. Baumol, supra note 13, at 529; Coleman, Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law, 68 Calif. L. Rev. 221, 239 (1980).
sult in the greatest net dollar gain. Alternatively, the court could try to select that rule which, in every future application, would yield an outcome that was Kaldor-Hicks superior to every other possible outcome. The obvious difficulty with this suggestion is that the court would be unable to determine the dollar estimates for all future gainers and losers in all future lawsuits. Thus, the only plausible way to apply the Kaldor-Hicks standard on the level of rule evaluation is to proceed as outlined in the first way.

Whether it would be preferable to apply the Kaldor-Hicks standards on a case-by-case basis or on the level of rule evaluation is an interesting question, but not one that will be addressed here. The criticisms offered here apply to either method of application.

Before discussing these criticisms, it is important to notice that the Kaldor-Hicks standards of efficiency are strong value-specific standards presupposing a nonevaluative standard of the good. They are strong value-specific standards advocating the maximization, with all possible first-order efficiency, of the number of social choices leading to Kaldor-Hicks superior states. Furthermore, the standards presuppose nonevaluative standards of the good in relying exclusively upon the preferences of the members of the affected classes, as expressed through willingness to make dollar bids for particular judicial resolutions.

Neither Kaldor-Hicks standard is usable by a court unless it can accurately identify the classes of gainers and losers under every alternative. As is the case with the Pareto standard, the only way to identify such classes consistently with the subjectivist basis of the Kaldor-Hicks test is to ask each member of society whether he would deem himself benefited or harmed by a particular choice. If an individual reports that he would gain by a particular choice he can then be asked to state how much he would be willing and able to pay those who regard themselves as harmed, and by what amount, if any, his total benefit would exceed the total compensation payments. Those regarding themselves as harmed by a particular choice would be asked to state the sum of money they would require as adequate compensation for their self-perceived harm.

This need to poll each member of the society makes the Kaldor-Hicks method unusable in adjudicative contexts. As with the Pareto standard the problems of time and expense would be insurmountable. By avoiding the task of asking persons if they would regard their welfare as affected by a particular judicial choice, a
court would be substituting its judgment about the welfare of others for the judgments of those persons themselves, thus forsaking the subjectivistic program of the Kaldor-Hicks method.

Once the relevant classes were identified the court would have to ascertain, for each judicial alternative, the dollar amounts the losers would demand as adequate compensation. Again, the only way of assuring accuracy would be to ask the members of those classes. The same difficulties would arise as were noted in the analysis of the Pareto program. The surveying would have to be done in such a way as to make the judicial alternatives meaningful to each class member. The Kaldor-Hicks method will yield coherent results only to the extent that informed bids are made by those affected. Generally, this would require prior educational assistance, resulting in even greater expense. If in an effort to avoid the task of interviewing each member of the affected classes the court were to substitute its own judgment as to the dollar bids and compensation demands, the ultimate objective of the Kaldor-Hicks method will have been abandoned. That objective is to base social choices upon subjectively-perceived dollar estimates of utility. Hence, the method requires that those subjectively-perceived estimates be obtained from those whose estimates they are supposed to be.

Aside from these problems of time and expense, there are difficulties inherent in the very suggestion of persons making the required dollar estimates. The purpose behind the suggestion that affected individuals make dollar estimates of their subjectively-perceived gains and losses is to avoid the utilitarian's problem of measuring welfare. Instead of asking a person how many units of utility or disutility he would incur under a particular social choice, one asks a person how much he would be willing and able to pay for the benefit or if he deems it a harm, how much he would insist upon as compensation.

One of the problems with this proposal is that such estimates are not likely to accurately measure subjective welfare if the persons polled know that the judicial system uses the Kaldor-Hicks method of evaluation and know that this method does not require payment of actual compensation to the losers under a particular alternative. If A thinks that a certain alternative would benefit him and he knows that he will not have to pay actual compensation to those who oppose the alternative, he will be tempted to make a larger Kaldor-Hicks bid than he would make if he knew that he would actually have to pay the sum. Consequently, appli-
cation of the Kaldor-Hicks method would result in an overstate-
ment of the welfare value of judicial alternatives. In addition,
those who believe they would lose under a particular judicial alter-
native will also understand that no compensation will actually be
rendered and will therefore have no incentive to state their true
beliefs. Instead, they will have a strong incentive to state compen-
sation demands at prohibitively high levels, with the consequence
that the method would result in an overstatement of the value of
burdens imposed by the alternatives.

A more fundamental difficulty with the proposal concerns the
intuitive reluctance many feel at even trying to translate certain
kinds of advantages or harm into monetary value. There is an
obscure, but strong, sense that the very effort to make such transla-
tions to the extent called for by a rigorous application of the
Kaldor-Hicks program would somehow change the fabric of one's
consciousness of the self and the world. In order to determine
whether there is any justification for this common reluctance we
must begin with the fact that we are being asked to place dollar
equivalents upon things we value. That is, we are being asked to
state the amounts of money we would be willing and able to pay
for things we regard as valuable. The question is whether the at-
tempt to comply in any sustained and comprehensive manner will
tend to alter our experience of reality for the worse.

Because we are being asked to translate our perceived values
into monetary equivalents it is necessary to consider the phenome-
non of money. Money is a means of exchange. The concept of a
means of exchange is logically related to the concept of trade
which, in turn, is logically related to a concept of a market. Thus,
one of the presuppositions of the Kaldor-Hicks request is that the
things we are being asked to translate into monetary equivalents
are things that conceivably could be acquired through a market
exchange. But some values cannot be acquired through trade;
they arise, if at all, through individual effort or interpersonal rela-
tionships that transcend the market. Insofar as one falls into the
habit of thinking of such values as attainable through trade, one
risks losing a genuine experience of those values themselves.

Consider an individual for whom the experience of reading and
reflecting upon Gerald Manley Hopkins' "The Windhover" or
"God's Grandeur" is deeply moving and significant. I submit that
such a person would tend to regard with distaste a Kaldor-Hicks
demand that he translate the value of this spiritual experience into
a dollar amount. One senses, perhaps unconsciously, that if one
were to try such a translation one would risk shattering the structure of the poetic experience itself. Some modes of experience cannot be acquired through exchange. To the extent that one seduces oneself into believing that they can be so acquired one makes it more difficult to fully savor the experience. The suggestion that one ought to be able to translate all modes of experience into dollar figures is a step in the direction of such self-seduction. A similar point can be made with respect to other experiences, including love, friendship, creative work, artistic expression, play, laughter, awe, mystery, and worship.

It might be objected that these contentions are surely too extreme. Is it not commonplace that people have no spiritual difficulty in evaluating and paying dollar amounts for items such as books, which, in turn, are necessary conditions for certain kinds of experience? Why should it be any different for legal entitlements? After all, entitlements are also necessary conditions for certain modes of experience, and it is only the entitlements which the Kaldor-Hicks method requires us to evaluate in monetary terms.

Nevertheless there is a significant difference in the relationship between the respective conditions and the modes of experience they make possible. It is true that obtaining a copy of Hopkins' poetry is a necessary condition for experiencing that poetry in a deep way and that one will have to be willing to exchange a sum of money for a copy (putting aside for the moment such possibilities as listening to another read the poetry or obtaining a copy by gift). Nonetheless, the condition of being protected by the legal system against the intrusions of others with respect to engaging in a particular mode of activity impresses one as more integral to that mode of activity than does the condition of paying a sum of money for a book. What I mean by "more integral" is that in the protection-from-intrusion case, one would be more tempted to let a dollar evaluation of the enabling condition carry over in one's consciousness to the activity that the condition makes possible. The enabling condition is not so easily detached from the mode of experiencing as is the case with the price of a book and the experience of reading that book.

This, however, is only a difference of degree. Even in the case of buying a book of poetry one has to guard against the tendency to assimilate in one's own mind the cost of the book and the potentially profound experience of reading the poetry itself, an experience which cannot be acquired on the market.
Another factor flowing from the implicit appeal to the metaphor of the market is the sense that certain values should not have to be purchased at all, but that one's fellow human beings ought to be willing to protect them simply by virtue of their intrinsic humanity. Think of such values as life, bodily integrity, freedom of expression, and freedom of religion. The request that one translate these kinds of fundamental values into dollar amounts tends to make one think of them as obtainable only through voluntary market transactions and thereby engenders a sense of alienation from one's fellows. That is, continued appeal to the market metaphor tends to erase one's sense of human solidarity. It promotes an atmosphere of competitive interpersonal confrontation in which one perceives one's very life to be at stake. The implicit suggestion is that unless one can bid enough for the value, no one else will be willing to obtain it for him. Of course I am not suggesting that the present state of society is in such a condition of disintegration. But I am suggesting that appeal to the market metaphor with respect to fundamental values tends to induce a psychological sense of alienation from others which, in turn, can contribute to the weakening of human solidarity.

Two additional factors arise from the implicit assumption that money is the ultimate standard into whose terms all values can be translated. The suggestion seems to be, "If you can translate this value into dollars and cents then perhaps I can begin to understand the value." One implication of this assumption is that the ideal mode of existence is that of the consumer who masters the human situation through the power of his purse. But if this ideal is not well founded, as it surely is not, then the Kaldor-Hicks question is spiritually dangerous if taken too seriously. A second implication is the assumption that no value is personal enough or close enough to the center of the human essence to avoid translation into the universal medium of exchange. This comes close to experiencing oneself as a commodity.15 If all values can be reduced to dollar amounts, then it is no great leap to conclude that one's very self is also so reducible. One's very personhood becomes a commodity with a market price.

The foregoing point concerns perceived benefits. What about perceived harms? Is there a similar incompatibility between certain modes of suffering and the request that one reduce such suffering into dollars? I think there is. Certain deep forms of suffering

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15. For a general discussion, see E. Fromm, The Sane Society 76-184 (1955).
threaten the very core of personhood. Think, for example, of the kind of suffering involved in living without basic civil rights. To suggest to a person that he should be able to correlate dollar figures to any such suffering is to ask him to conceive of his personhood without the benefit of basic civil rights. The requested dollar figures are, by definition, what he is supposed to regard as "adequate compensation" for the suffering. But there are some modes of suffering that a person should not be encouraged to think of as being adequately compensable by money. To undergo such suffering is to become less than a person. And for one to try imagining dollar amounts that would adequately compensate him for such suffering is to risk alienating oneself from one's own sense of personhood.

Another difficulty with the Kaldor-Hicks method of evaluation arises from its dependence upon ability to pay. Recall that the self-perceived gainers under a particular social choice are asked to state the dollar amount they would be willing to pay for the benefit. But ability to pay ought not have any bearing upon certain fundamental human rights. For example, with respect to rights such as freedom of speech and religion, we are morally entitled to legal protection simply by virtue of being persons. To make one's entitlement to such protections depend upon ability to pay is to treat a person as less than a being of intrinsic worth.

Consider a simple example in this regard. Imagine a society comprised of two racial groups, one constituting the vast majority. Suppose that the majority hates the minority, that the majority owns the greater proportion of the society's wealth, that the minority is poor and politically powerless, and that the judicial choice is between giving or denying religious liberty to the minority. Suppose, finally, that the Kaldor-Hicks dollar estimates comes out as follows: (1) The majority's aggregate dollar bid for a rule denying the minority religious freedom is fifty million dollars. (2) The minority's demand for compensation under a rule denying them religious freedom is ten million dollars. The minority feels constrained by the fact that they have very little income and need the money to survive. (3) The minority's aggregate bid for a rule protecting their religious freedom is five million dollars; they cannot afford a greater sum. (4) The majority's demand for compensation under a rule giving the minority religious liberty is fifty million dollars. This figure represents the psychic suffering the majority believe they would incur as a result of witnessing the minority exercise their religious preferences. The first Kaldor-Hicks
standard would require the court to deny the minority religious freedom. The net welfare-dollar gain under such a rule would be forty million dollars, while there would be a net welfare-dollar loss under a rule protecting the minority. A criterion of social choice which generates such a result is morally objectionable.

It might be suggested that such counterexamples can be avoided by interpreting the Kaldor-Hicks standard as applicable only after an equal distribution of social product had been made. But there are at least two difficulties with this suggestion.

First, courts would have no way of knowing what the Kaldor-Hicks dollar bids and demands would be under circumstances of an equal distribution of wealth. It is true that each member of the affected classes could be asked to make hypothetical bids and demands based upon the nonfactual assumption that he has some specified level of income and wealth equal to everyone else's share. But it is doubtful whether such hypothetical estimates would carry much validity as accurate welfare measures.

A more basic problem arises from the fact that the Kaldor-Hicks method is a strong value-specific efficiency standard based upon a nonevaluative theory of the good. Thus, even if all Kaldor-Hicks bids and demands were based upon an equal distribution of income the possibility would remain that persons would make bids and demands in ways inconsistent with their own well-being. Consider the earlier example involving the majority and minority classes. Assume the same hatred of the majority for the minority and the same legal issue. Even with an equal distribution of income it is possible for the Kaldor-Hicks auction to result in the suppression of the minority's religious liberties. This occurs if the majority's hatred was strong enough to invoke a large bid for a rule denying religious liberty and if the minority, with an inadequate understanding of its own true well-being, submitted a demand for compensation that failed to do justice to the true measure of human loss.

As argued earlier in the discussion of the Pareto standard, the objection is not simply that the Kaldor-Hicks method can be used to reach morally objectionable results. It is also, and perhaps more importantly, that the method even requires one to take into account desires whose fulfillment will frustrate the common good. Surely one of the proper functions of an adequate set of moral principles is that of providing a means for disregarding certain kinds of desires and objectives as morally irrelevant from the very
outset. Thus, with respect to the foregoing example, the Kaldor-Hicks method requires one to count as equally relevant, for moral purposes, the hatred of the majority for the minority and the minority's desire for religious freedom. The fulfillment of the first desire will not bring about genuine well-being for the majority. Hence, it is morally objectionable to use a standard of evaluation that takes such desires into positive account.

With this background one can now quickly see that neither Kaldor-Hicks standard is morally justifiable. The first standard recommends that the judicial system make all moves that are Kaldor-Hicks superior to an existing state of affairs. This recommendation is morally unsound if there are Kaldor-Hicks superior alternatives that are morally objectionable. Examples such as the majority-minority conflict show that this is the case. The second standard advises against any social choice which is not Kaldor-Hicks superior to an existing state of affairs. This norm is morally unsound if there are alternatives which are morally superior, but not Kaldor-Hicks superior, to the existing state of affairs. That such is the case is easy to show. Consider a simple extension of the majority-minority example. Suppose that the existing situation is one in which the minority have no religious rights. Suppose further that the balance of economic power would result in a Kaldor-Hicks auction reaffirming the present rule. It would be morally preferable to change the legal system so as to give the minority religious rights, but it would not be Kaldor-Hicks superior to the present situation.

VII. EVALUATIVE AND NONEVALUATIVE STANDARDS IN ADJUDICATIVE CONTEXTS

All the efficiency standards reviewed in this paper share the assumption that it is unjustifiable for courts to try to assess the genuine common interest of those affected by judicial decisions. All share the assumption that the appropriate standard of the common good is solely a function of the personal evaluations of those affected by the adjudication rather than a function of the evaluations of the adjudicating courts. Let us begin by trying to understand the attractiveness of this assumption. I suggest that it is explainable on the basis of certain difficulties which proponents of nonevaluative methods believe they see in evaluative methods.

One possible explanation is that the reluctance to impose one's own view of the common good upon others is a consequence of
moral skepticism, the view that genuine knowledge of moral truth is unattainable. A question raised by this explanation is whether moral skepticism as so defined can adequately justify the non-evaluative method of adjudication.

An argument leading from the premise of moral skepticism to the conclusion that an evaluative method is unjustifiable would presumably look something like the following:

1. Genuine knowledge of moral truth is unattainable;
2. One is justified in coercing others only when one is in possession of genuine knowledge of moral truth;
3. Adjudicating on the basis of an evaluative theory of the good would constitute coercing others on the basis of something less than genuine knowledge of moral truth;
4. Hence, such adjudication is unjustifiable.

The conclusion favoring the nonevaluative method can be connected with the foregoing by the following:

5. The only alternative basis for adjudication is a nonevaluative standard;
6. Adjudication on the basis of a nonevaluative theory of the good does not constitute coercing others.

Assume for the moment that premise (1) is true and look to see whether the rest of the argument follows. One immediate problem is that (2) is inconsistent with (1). One would have to believe oneself in possession of genuine moral knowledge in order to make this claim sincerely. That is, (2) is itself a claim to moral knowledge and hence contradicts premise (1). Further, premises (1) and (2) prove too much for anyone who is not a pacifist. They imply that coercion is never justifiable. For anyone committed to some form of legal coercion such a position cannot be taken seriously.

A related difficulty is that applications of the Kaldor-Hicks standard will involve judicial coercion in any case. Given the fact that there will generally be conflicts of preference, those who lose out under particular applications of the standard will feel coerced. It is true that coercion does not accompany applications of the Pareto standard in the same way because that standard does not apply to cases of preference conflict. As argued previously, the Pareto standard is inadequate as a principle of adjudication and would have to be supplemented by some principle that enables courts to choose sides in cases of interest conflict, and such cases would involve coercion. Additionally, a member of the social order who believes on philosophical grounds that the Pareto standard is an inadequate principle of social choice and who is forced
to live under judicial applications of the standard will feel coerced, even when he happens to agree with some applications of the standard. Thus, premise (6) is mistaken.

Evaluation of premise (1) requires consideration of the concept of moral knowledge. Moral knowledge is the knowledge of good and evil. Intrinsic goods and evils are those things good or evil in themselves. Instrumental goods and evils are those things which serve as conditions for intrinsic goods and evils. The categories overlap. The distinction between intrinsic good and evil arises within human experience itself. That is, it is particular modes of human experience that are intrinsically good or evil. Any particular mode of experience is intrinsically good to the extent that at least one of its dimensions fulfills a desire of the subject. Similarly, a mode of experience is intrinsically evil to the extent that at least one of its dimensions frustrates a desire of the subject. Thus, the distinction between intrinsic good and evil arises because we have needs and desires and are able to distinguish fulfillment from frustration of desire.

An intrinsically good experience, or dimension of an experience, is desirable in itself in the sense that, other things being equal, it is rational to pursue it for its own sake and not merely because it may be a means toward some further experience. Existing in the presence of intrinsic good means existing in the awareness that at least one aspect of present experience brings happiness and requires no justification beyond itself.

This is not to suggest that there are unmixed states of either intrinsic good or intrinsic evil. This may be possible but it is not the norm. Introspection shows that experience is a synthetic unity of intrinsically good and evil dimensions. We simultaneously experience fulfillment and frustration. That this is so is to be expected, given the fact that many desires co-exist in any given moment of consciousness, that some of them are mutually incompatible, and that others are necessarily incapable of complete satisfaction. Of course, some modes of experience have greater or lesser degrees of intrinsic good or intrinsic evil than others and we make such discriminations continually. I am only denying that there are modes of experience containing either intrinsic good or evil to the exclusion of the other. The simple fact that a given individual persists in the effort to stay alive shows that at least some dimensions of his experience are intrinsically fulfilling.

Given an awareness of the distinction between fulfillment and
suffering, one learns through experience that certain actions and conditions tend to promote intrinsic good while others tend to frustrate it; the process of living in the world tends to instruct one in the knowledge of instrumental good and evil. I do not mean to suggest that such beliefs are always certain or well-founded. There is a great deal we do not understand about the conditions of intrinsic good and evil. That we have some degree of understanding, however, cannot be doubted. Similarly, I do not mean to suggest that our knowledge of intrinsic good and evil is ever certain or complete. There will never be absolute certainty as to the content or precise boundaries of the intrinsically good human life. But this inevitable lack of complete knowledge does not imply a lack of any knowledge of intrinsic good and evil. Everyday experience confirms that we do have such knowledge.

Thus, one who can distinguish between states of his own happiness and suffering and understand at least some of the casual relationships between such states and other conditions has some degree of self-knowledge. That is, he understands at least some of the content of intrinsic and instrumental good and evil for his own case. The question arises whether such knowledge can be extended to knowledge of good and evil for others and whether such goods and evils have everything in common with one’s own. I think that such extensions are often made. One learns by experience that many of the things that constitute intrinsic goods and evils for oneself are also intrinsic goods and evils for others. Indeed, such knowledge is an essential part of what it means to come to experience oneself as one person among others. One comes to perceive oneself as sharing certain fundamental needs and desires with all others, thereby coming to understand at least some of the dimensions of the human essence.

Knowledge of universal goods and evils is acquired in various ways. Sometimes one is initiated into a particular kind of activity or experience by another who already practices and loves it. Sometimes one finds oneself doing the initiating. On other occasions one finds oneself coming together with others under circumstances in which everyone understands the nature of fulfillment that participation can bring. In all such situations one both finds a particular kind of activity intrinsically fulfilling and experiences others as participating in the same good.

Therefore, I conclude that premise (1) is false. Genuine knowledge of moral truth is attainable. We live with such knowledge everyday and are continually drawn by our very success in attain-
ing it to seek deeper illumination concerning intrinsic good and evil and its conditions.

A second possible justification for the nonevaluative method of adjudication can be construed by dropping premise (1) while retaining the rest of the argument. One would then have the following:

1. One is justified in coercing others only when one has genuine knowledge of moral truth;
2. Adjudicating on the basis of an evaluative theory of the good constitutes coercing others on the basis of something less than genuine knowledge of moral truth;
3. Hence, such adjudication is unjustifiable.

Again, the following steps would be needed to reach a conclusion favoring a nonevaluative method:

4. Adjudicating on the basis of a nonevaluative theory of the good is the only alternative;
5. Such adjudication does not involve coercion on the basis of something less than genuine knowledge of moral truth.

One difficulty with this argument is that premise (1) sets an unreasonably high standard. It should be sufficient to have a justified belief in the sense that one believes certain propositions on the basis of considerations which make them well-founded, given one's conscientious understanding of the circumstances. (Of course, what may be well-founded in one epistemological situation might not be in another.) It is unreasonable to go further and insist that the belief must be true. It would follow from such an assumption that one should never coerce another when one has less than absolute certainty. Not even absolute certainty would be a sufficient condition for complete justifiability under the proposed standard. In addition to being absolutely certain one would have to be correct. But one must often act, under conditions of uncertainty, in ways that have coercive effects upon others. To argue that one must not act without absolute certainty would require foregoing action in many circumstances that call for a quick decision.

Suppose for the sake of argument that the phrase, "genuine knowledge of moral truth," as used in premises (1) and (2), is construed so as to require only justified moral belief. This would avoid the above difficulty. The question then is whether the premises as interpreted are true. The answer depends upon what is meant by "justified." I suggest that proponents of such an argument assume that a moral belief is justified only if a consensus of
informed opinion with regard to the claim is achievable. It is because many doubt the possibility of such an informed consensus with respect to evaluative judgments that they are led to subscribe to premise (2).

Is it true that a moral belief is justified only if a consensus of informed opinion with respect to the claim is achievable? The answer depends in part upon how one defines the terms "achievable" and "consensus of informed participants." If one defines "achievable" to mean attainable under present historical conditions within a relatively short period of time, and if one defines "consensus of informed participants" to include the opinion of any intellectually competent adult, then the claim is false. With respect to most coercive situations there will exist at least one intellectually competent person who, if informed of the circumstances, would question whether coercion is morally justifiable. Yet we do not take this ever-present possibility to imply that coercion is never morally justified. On the other hand, if one restricts the concept of informed observer to include only those who believe that a given act of coercion is morally justified, one has achieved truth at the expense of triviality. There is a sense in which a natural law theorist would be committed to defending the proposition. Part of the natural law understanding is that there exists a complex of fundamental needs and desires common to all persons, fulfillment of which promotes genuine integration. It is also part of this understanding that, given perfect knowledge and moral integration on the part of all members of the informed community, there would be achievable a consensus concerning the justifiability of specific acts of coercion. Of course, such conditions are not presently realizable. That there exists an objective moral truth and that this truth is partially knowable are guiding principles in a natural law search for moral understanding.

Commitment to an objective order of moral truth in the foregoing sense does not commit the natural law theorist to the proposition that acts of political coercion should never be undertaken in the absence of consensus. On the contrary, the natural law understanding is that moral knowledge is elusive and controversial, that it arises out of a continuous dialectic of conflicting claims, and that it is an essential part of seeking the truth to be prepared to move ahead in the face of intellectual and political opposition. Indeed, it would be a serious error to use the presence of social consensus as a criterion for moral knowledge. The primary source of knowledge of good and evil is one's own consciousness. Looking exclusively to
others for moral guidance with respect to the nature of the good is a certain way to fail to achieve any moral guidance at all. If the primary source of moral knowledge is one's own consciousness, then we would only mislead one another in our respective quests for moral understanding by each looking exclusively to the other. No one would be tapping the primary source of understanding and consequently all would be misled. Thus, premise (1) is false if construed to mean that one is justified in coercing others only when coercion will garner a consensus of informed observers.

Let us move to a consideration of premise (2). What is the justification for believing that adjudication on the basis of an evaluative theory of the good necessarily implies proceeding on the basis of something less than genuine moral knowledge?

I suggest that at least part of the consideration typically thought to support premise (2) is the belief that there is no common human essence and hence no common good. Moral knowledge is attainable by each person for his own case in the sense that each can learn the content of intrinsic good and evil for himself. Efforts to generalize from one's own experiences of fulfillment will fail. One can make no useful generalizations about the nature of human fulfillment and frustration. One person finds happiness through hatred and cruelty; a second through narrow self-interest and indifference to the needs of others; a third through other-regarding love. Because there are no moral universals and because introspection is a more reliable method for identifying the nature of the good for a particular individual than is external observation, adjudication should rely solely upon each concerned individual to report the nature of the good for his own case. A nonevaluative standard satisfies this condition; an evaluative standard does not. An evaluative standard involves precisely the attempt to generalize from one's own experiences of fulfillment and frustration to the situations of others.

The absence of common elements binding together human experience of good and evil entails an inevitable absence of consensus concerning any particular application of an evaluative standard of the good. Presumably, the nonevaluative standards under consideration in this paper do not share this weakness for we all know how to count noses and dollars, and that seems to be the only prerequisite for applying the Pareto and Kaldor-Hicks standards.

I have already outlined criticisms of the claim that there is no
common human essence and of the belief that the only justifiable moral standard of good is one that can be applied by consensus. For these reasons alone premise (2) must be rejected. An even deeper motivation behind the fascination with nonevaluative standards of the good is their implicit promise of being applicable through quantitative methods. Once we have identified the relevant classes all we need do to apply the Pareto standard is count the responses. All we need do to apply the Kaldor-Hicks standard is count positive and negative dollar amounts. The underlying idea is that evaluative standards of the good require qualitative judgments and that such judgments necessarily involve controversy. Only quantitative standards can supply intersubjective agreement. We know how to count persons and dollars and we all count them in the same way. Thus, such reflection simultaneously inclines one to reject (2) and accept (5).

The notion that a belief that cannot be reduced to quantitative form fails to qualify as genuine knowledge runs deep in post-Enlightenment culture. It is the historical result of at least two factors. First, we tend to be overly impressed and misled by modern physics' application of mathematical methods. We fail to see that even within the boundaries of the problems explicitly studied by physics, quantitative methods raise deep philosophical issues that ultimately can be formulated and discussed only in qualitative terms. Moreover, we tend to forget that physics does not even purport to deal with the philosophical problem of how to live, the question which the law must confront.

A second factor is our disillusionment with traditional forms of philosophical discourse that rely upon qualitative judgments. We are weary of the interminable controversy seemingly inherent in the traditional mode of philosophizing. We long for the apparent clarity and intersubjective agreement of quantitative methods. We are tired of bearing up under the sense of moral responsibility that comes with the realization that qualitative judgments are potentially isolating. My qualitative judgments might be different from yours and I must then choose at my peril. What we would like is a mechanically applicable method to which all could subscribe in good conscience and in whose applications all could agree. Such a method would lift the burden of responsibility.

16. For an illuminating discussion of the general influence of the scientific model upon the field of law and economics, see Horwitz, Law and Economics: Science or Politics?, 8 Hofstra L. Rev. 905 (1980).
From thenceforth we could say to whoever complained about the direction of social policy, "It is not my doing at all. The coercive effects you dislike are the inevitable outcome of a system of knowledge that generates quantitative results about which there can be no rational disagreement."

Philosophical and moral knowledge, however, cannot be attained through quantitative methods. An ability to make qualitative judgments is a necessary condition for counting anything. To count is to correlate instances of a concept with numbers. For example, counting the number of persons in a building means counting the number of instances of the concept 'X is a person in this building.' Similarly, measuring the weight in ounces of a given object means counting the instances of the concept 'X consists of one ounce of this object.' It follows that counting requires the recognition of certain phenomena as instances of whatever it is one is trying to count or measure. Hence, quantitative judgments necessarily presuppose qualitative judgments. In addition, the very choice of a method and scale for measuring a given quantity necessarily involves qualitative judgment. There is no way of counting one's way to seeing that a given method is an appropriate one for measuring a given property.

In nonmoral contexts such as measuring the weight or length of physical objects, neither type of dependence presents any special difficulty. In such cases there is general agreement both as to recognizing instances and as to appropriate methods and scales of measurements. The situation is different in moral contexts. First, the problem of recognizing a given phenomenon as an instance of any countable unit involves hopeless controversy over how to measure welfare directly. It is true that we can avoid this problem by substituting language of numbers of persons or dollars for language about the good. These are the Pareto and Kaldor-Hicks alternatives. But, as we have seen, these alternatives merely postpone the inevitable qualitative judgment that such units of measurement are adequate for capturing the moral realities of good and evil. This qualitative transition is inherently controversial and we cannot count our way out of the controversy at this level. It is in this sense that moral knowledge is ultimately beyond the reach of quantitative methods. Thus, I conclude that premises (2) and (5) must be rejected.

Our preoccupation with the market system as a way of organizing human conduct provides yet another explanation for the attractiveness of nonevaluative methods. We are attracted to
theories which extend the economist’s understanding of human interaction in market settings to other dimensions of life. The Kaldor-Hicks standard relies upon the picture of a hypothetical market. Persons are conceived as translating their desires and aversions into monetary terms and then entering into mutually satisfactory trades with others who have made similar translations. And even though the Pareto standard does not rely upon the notion of a market in which mutual exchanges in the Kaldor-Hicks sense occur, it does rely on the idea of persons coming together and entering into a comprehensive contract that each sees will either increase, or at worst, not affect, his welfare. That is, the Pareto standard relies on the idea of persons mutually agreeing to exchange their rights to make objections to future applications of a given practice for the security of living under a rule which appears beneficial. But if it should turn out, as I think it does, that the deepest dimensions of good and evil cannot be reached with such a theory, then we err in using the concept of a market transaction as paradigmatic for moral reflection. If there are desires that transcend the kinds of narrowly self-interested desires providing the impetus for market exchanges, and if moral justification ultimately requires something beyond the mere promise of mutually beneficial trades between atomistic members of a class of rationally prudent egoists, then reliance upon the market metaphor can only mislead us.

These last suggestions can be made more concrete by considering the justifiability of an adjudicative method that relies upon an evaluative standard of the good. I shall consider the question of justification both from the viewpoint of the adjudicator and from that of the person whose interests are adjudicated.

Let us first briefly consider the nature of a moral justification for an action or practice. A moral justification is a practical argument in the sense defined by the natural law tradition. A practical argument purporting to justify a particular act, X, is a set of premises which purport to show that X is a reasonable means of fulfilling some desire or purpose, which, in turn, is either an essential component of an intrinsically fulfilling mode of existence or a useful means toward such.

The moral question for the adjudicator is, “How can I justify adjudicating cases on the basis of my own theory of the common good when such action forces me to contradict at least one other person’s sense of value and consequently coerces him?” The general justification I propose is that the adjudicator, by virtue of his
human essence, has a fundamental desire to contribute to the common good and that this objective requires making choices on the basis of his own sense of good and evil.

The desire to realize through action one's fundamental powers is part of the human essence. One of these fundamental powers is the power to contribute to the integrated realization of the essential powers of others, which is to say, contribute to their fulfillment. This desire, in turn, is part of a more inclusive desire to contribute to the realization of essential potentiality. Living creatures are defined by their potentialities. They find whatever degree of fulfillment they are able to attain by realizing these potentialities. Those who assist in that kind of realization fulfill themselves in the very act of so contributing. This basic desire to contribute to the perfection of life is exemplified in persons finding satisfaction through tending plants, caring for animals, raising children, and interacting with close friends. In all such cases the satisfaction consists in the very activity of contribution to the unfolding of the essential capacities of other forms of life.

This fundamental desire to assist in the realization of the essential powers of others is innate, manifesting itself even in small children. It does not depend upon the attainment of any particular intellectual understanding of the nature of reality. The desire, however, can be strengthened and integrated by metaphysical reflection upon the mode of identity binding all beings together. This identity is evident from the fact that every finite being ontologically depends upon a source which itself is ungrounded. One's participation in this source is indirectly a participation in all the finite processes through which that source grounds.

A necessary consequence of using one's freedom is making choices that affect the well-being of others. The choices made inevitably affect the range of alternatives open to others, both by making some more difficult to attain than they would otherwise be and by making others more attainable. To the extent that one's action makes at least one alternative for another more difficult, that action has coercive implications. Of course, there is a tremendous range of variation with respect to types and degrees of coercion in this sense and I do not mean to suggest that they should all be evaluated alike. What I do suggest is that all action in social contexts has coercive implications for the choices available to others and that it is best to realize this at the outset of any philosophic effort to ascertain the nature of true morality.
Given one’s fundamental desire to contribute to the realization of the essential powers of others one would have no good reason for even trying to extricate one’s own sense of good and evil from those choices which causally affect the well-being of others. In order to contribute to the well-being of another one must rely upon one's own sense of good and evil for guidance concerning what true fulfillment for the other involves. Of course, an essential predicate for making such an attempt is putting oneself imaginatively in the place of the other in order to apprehend as directly as possible the other’s perception, feelings, and desires. But this kind of imaginative understanding does not require an abandonment of one’s own understanding of the good. The objective pursued is the ascertainment of good and evil for the other in his situation. This cannot be done without first truly understanding the other’s situation by imaginative identification with his perceptions and feelings. In addition, one must go on to apply one’s own sense of good and evil to the other’s situation as it is sympathetically perceived. Thus, the process of contributing to the unfolding of another’s essential powers consists of at least two steps: first, imaginatively participating in the other’s life situation and, second, trying to bring about what is genuinely good for the other in that situation. The second step cannot be effectively undertaken apart from relying upon one’s own understanding of the good. To rely solely upon the other’s vision of the good would be to abandon the enterprise altogether.

This kind of imaginative effort is a commonplace activity. A loving parent who makes choices that affect the well-being of his child will strive to both intuit the child’s feelings and to identify the good for the child on the basis of the parent’s own sense of good and evil. Neither effort would be helpful alone.

Of course, one will sometimes choose to go along with another’s perception of good and evil despite one’s contrary perception and despite one’s belief that the latter’s choices will ultimately cause suffering. But even in these cases one is guided by the conviction that freedom to make mistakes is often an essential condition for self-development. Thus, even here one is relying upon one’s own sense of good and evil. In other cases one will feel drawn to act on the basis of one’s own understanding of the good even though such action may carry coercive implications for the other.

An adjudicator occupies a unique political role. He is assigned the task of formulating and applying coercive social rules. This activity is justified by the fact that a society must have rules of
conduct. If there are to be rules someone must be charged with the responsibility for formulating and applying them. The activity of formulating and applying social rules necessarily has coercive implications for those who will be affected in some way by the adjudicator's decisions. Hence, the question is not whether to adjudicate in such a way as to avoid coercing others; there is no alternative. The question is whether to adjudicate on the basis of an evaluative or a non-evaluative theory of the good.

The argument for adjudicating on the basis of an evaluative standard is grounded upon the adjudicator's natural desire to contribute to the common good through the political role he has assumed. As argued above, everyone must make choices which carry coercive implications for others. One who seeks to contribute to the genuine fulfillment of others will necessarily strive both to sympathetically identify with the life situations of others and to act on the basis of one's own sense of good and evil. In this regard an adjudicator is no different. Indeed, if there is good reason for a nonadjudicator to proceed on the basis of his own theory of the good there is even more reason for an adjudicator to do so. Society has entrusted the adjudicator with the responsibility for systematically promoting the common good in a way that is different from the ways in which most other members of society do those things. The fundamental purpose of a legal order is the promotion of the common good. An adjudicator's special responsibility is the promotion of the common good through the formulation and application of coercive rules. The rational adjudicator will reason that, given this objective and given his natural desire to serve that objective, he must proceed on the basis of his own sense of the common good. How else could he feel justified in believing that his professional activities actually promote the common good? By using a nonevaluative theory of the good an adjudicator would deprive himself of the opportunity to contribute to the promotion of the ultimate purpose of the legal order.

What about the problem of justifying adjudication on the basis of an evaluative theory of the good from the standpoint of those who will be subjected to the adjudicator's decisions? One form of practical argument providing such a justification begins with the premise that the ultimate purpose of a legal order ought to be the promotion of the common good. For obvious reasons it is best to order a complex society by means of a division of labor. One aspect of such a division is the creation of a social role for formulating and applying legal rules. The question is whether those who
have to live under the decisions of those selected as adjudicators should rationally prefer evaluative to nonevaluative adjudication. I submit that they should prefer the evaluative mode. A rational individual should reason that he desires the genuine common good for all persons; that the ideal content of the common good and the most efficient ways of promoting it are complex matters requiring time, intelligence, and wisdom; that therefore the activity of systematically defining and pursuing the common good through the administration of the legal order ought to be done by those with the requisite time, intelligence, and wisdom; that the ultimate touchstone for knowledge of intrinsic good and evil is the inner consciousness of the individual himself; and that administering the legal order through the moral perceptions of educated and wise persons is a more likely means of securing the common good than any alternative.

A significant feature of this justification is the assumption that those subjected to the adjudicative power of the courts both desire the common good and believe that others (in particular, the adjudicators) do so as well. Similarly, the justification from the viewpoint of the adjudicator relies upon the assumption that both the adjudicator and those subject to his decisions desire the common good. Both arguments depend upon the belief that persons can and do have genuine desires for the well-being of others. Both rely upon a fundamental sense of trust in the other. Such arguments contrast with arguments that assume persons are incapable of genuinely desiring the fulfillment of others. Actions which contribute to the well-being of others are explained on the basis of narrowly self-interested concerns. The Hobbesian conception of human nature illustrates the pattern. In such a picture of human relationships there are only three basic modes of relating to another: submission to the other's coercive power, exercising coercive power over the other, and arms-length cooperation based upon cool self-interested calculation. The conflict between these two kinds of moral argument is one of the deepest in political philosophy. I cannot here even begin working through the considerations involved. Suffice it to say that the Hobbesian picture is defective on at least two grounds. It fails to adequately explain the degree of cooperation and other-benefiting activity that actually exists and it fails to correspond with our intuitions of our own motivations and those of others.

Should courts using evaluative methods rely at all upon the methods of economists, and, if so, how should they use them? Ad-
judication calls for the application of knowledge, intelligence, and wisdom to the concern of promoting the common good through the creation and application of coercive social rules. The task involves both a vision of the common good and a sustained effort to determine, in particular circumstances, the best means of working toward that ultimate end. In resolving a particular issue the adjudicator will begin by distinguishing alternative solutions. He will try to estimate the likely causal consequences for society that would result from each alternative. He will evaluate these various sets of consequences in terms of their moral significance, both for good and for evil. Finally, he will try to select that solution whose probable causal consequences will best promote his vision of the common good in that context. It is at the second stage of his task, viz., that of predicting the likely causal consequences of each alternative, that the adjudicator will often find economic theories useful. Insofar as such theories have predictive force, the adjudicator will find them of value when it comes to estimating future consequences of judicial decisions. The adjudicator using an evaluative standard of the common good, however, will not be willing to yield to the economist, or anyone, the determination of the moral significance of the various sets of consequences.

This point can be seen more clearly by considering in more detail the nature of the task of evaluating the moral significance of causal consequences. Essential to such an evaluation is the determination of the benefits and costs that would result from the adoption of each available alternative. Consider the concept of a cost (or burden). It is a truism that the cost of any particular choice is the next best choice that could have been made. It is obvious that one cannot determine what the “next best choice” would have been without relying upon a substantive theory of the good. People who differ with respect to their conceptions of intrinsic good will differ over the identification and evaluation of the costs of particular choices. Contrast, for example, the way in which a wealthy hedonist would evaluate the costs of a system of progressive taxation with the way in which a democratic socialist would evaluate those costs. The adjudicator will naturally be interested in learning how others evaluate the moral significance of the likely causal consequences of alternative choices confronting him as a judge, but he will reserve for himself the final decision as to their moral significance. That is his unique responsibility and privilege. Relying upon a nonevaluative theory of the good would mean rejecting this responsibility and privilege.
The primary purpose of setting apart the role of adjudicator is to obtain the benefits that can flow from the disciplined application of specialized knowledge and wisdom to the promotion of the common good through the creation and application of a system of legal rules. Permitting adjudicators to use nonevaluative standards of the good would frustrate that purpose.

What does an evaluative method of adjudication entail with respect to the question of quantifying burdens and benefits? That is, what about the possibility of reaching decisions concerning the common good in particular contexts by the use of solely quantitative methods? Such methods can be used in certain circumstances, but only upon the satisfaction of certain conditions. The adjudicator must first identify possible burdens and benefits in terms of his own ultimate standard of the common good. If some of these burdens and benefits are adequately measurable in quantitative terms they can be handled quantitatively. But the use of quantitative methods is limited by the prior application of the adjudicator's own standard of the good. It is that standard which dictates when quantitative methods are appropriate for measuring costs and benefits. There is no way of making the logically prior moral decision as to the very identification of burdens and benefits by quantitative methods alone.

Furthermore, this logically prior task of identifying burdens and benefits in light of an all-inclusive standard of the common good is not reducible to any mechanical decision procedure. This dimension of the adjudicative activity necessarily involves bringing to bear the adjudicator's conception of the good upon the concrete situation. Such instantiation of the good cannot be mechanized because it must be done teleologically. That is, the decisionmaker must ask himself, "What is the nature of the common good and how may that good be best realized in this situation?" This question cannot be adequately answered by the mechanical application of a rule. What is required is rather an act of intuitive perception in which one responds to the situation and one's ideal with all one's intellectual, emotional, and spiritual powers. This cannot be mechanized.

It is instructive to observe the extent to which the adjudicative practices of the courts are in accord with the foregoing analysis and recommendations. That is, courts have generally adjudicated on the basis of evaluative standards of the common good and have weighed benefits and burdens in the light of such standards. The common-law theory of private nuisance is a good illustration. The
general proposition is that the courts adjudicate between conflicting patterns of land use on the basis of an evaluative theory of the common good. They must consider both the contribution to the common good of the defendant's activity and the contribution of the plaintiff's pattern of use.\textsuperscript{17} The "utility of the defendant's conduct must be weighed against the gravity of the plaintiff's harm."\textsuperscript{18} Determining the social value of any given pattern of land use must be made from an "objective point of view" as opposed to that of any particular individual, and the resolution of the conflicting patterns of use must be made in light of the true interests of the community as a whole.\textsuperscript{19}

Thus, the very ascertainment and weighing of the costs and benefits flowing from alternative resolutions of a land-use conflict are made in light of the decisionmaker's evaluative standard of the common good. To take an extreme example for purposes of making the point, consider the situation of a land owner who maintains a certain structure or engages in a certain activity primarily for the purpose of annoying his neighbor. The neighbor sues for injunctive relief. When it comes to the matter of determining the extent of social value flowing from the defendant's conduct the decisionmaker must choose between applying his own theory of value or that of the defendant. That is, he must choose between an evaluative and a nonevaluative standard of the common good. The defendant may well value his activity very highly. It may be one of the defendant's overriding passions in life to cause his neighbor suffering. In fact, the defendant may even be an individual of great wealth and in a Kaldor-Hicks auction might be willing to bid a very large sum of money for the benefit (in his eyes) of having a court resolve the case in his favor. On the other hand, the adjudicator may not believe the defendant's desire to hurt his neighbor has any positive social value; he may well deem it to be of negative social value. Hence, the final determination as to the net social utility of the defendant's conduct will depend directly upon the adjudicator's standard of the common good and upon whether that standard is evaluative or nonevaluative.\textsuperscript{20}

A similar point can be made with respect to the evaluation of a

\begin{itemize}
\item \textsuperscript{17} See 5 R. Powell, The Law of Real Property ¶ 705 (1981).
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Restatement (Second) of Torts § 826 comments c, d, e (1979); id. § 827 comments b, e, f, g; id. § 828 comments c, f; id. § 829 comments c, d; id. § 821F comment d.
\item \textsuperscript{20} See id. § 829 comment c.
\end{itemize}
plaintiff's alleged harm. Consider the case of the so-called "hyper-sensitive" plaintiff. Imagine, for example, a land owner who has an abnormal fear of a ringing church bell. The adjudicator, in evaluating the context of the harm to the plaintiff, will not automatically accept the evaluation of the plaintiff. He will rather try to determine the extent of the harm in terms of the "normal" individual.21 Thus, the ascertainment and measurement of a cost is a function of the decisionmaker's standard of the good and what that standard entails with respect to the purposes to be served in a judicial resolution of the dispute. The abnormally sensitive plaintiff is dominated by an overriding purpose, viz., to avoid hearing the peal of church bells. In light of that objective, being forced to live in the vicinity of a church bell imposes a very substantial cost. Such an individual who happens to command great wealth would probably be willing to demand a large amount as compensation in a Kaldor-Hicks auction. But in light of the adjudicator's objective of tailoring land-use rules for "reasonable" persons, the burden of listening to the occasional peal of a church bell is not nearly so onerous. Implicit in this concept of the "normal" individual is the assumption that the rules formulated by courts ought to encourage the development of at least the minimal conditions for a certain kind of character structure. This is clearly the product of an evaluative standard of the common good.

One conclusion to be drawn from such observations of the law is that the mere fact that courts consciously engage in a process of balancing burdens against benefits does not necessarily mean that they are thereby using the Kaldor-Hicks method. Any method of moral or legal evaluation which takes into account the probable consequences of choices will use "balancing" language. The reason for this tendency is that courts reason teleologically and therefore necessarily must consider the possible effects of alternative choices upon various objectives and "balance" the attainment of some against the preclusion of others.

VIII. Conclusion

I have argued in this paper that the Pareto and Kaldor-Hicks efficiency standards go far beyond the ideological purity of first-order efficiency standards. They are strong value-specific efficiency standards that embody theories of intrinsic good. In short,
they are standards grounded upon philosophical premises and therefore ought to be evaluated as philosophies of the common good rather than as innocent value-neutral norms of science or common sense. I have argued that as theories of the good both standards are inadequate for the task of evaluating the content of a legal system. If used at all, they ought properly to be grounded upon more comprehensive and more adequate principles which define the limits within which they can operate with reasonable results. My own conviction is that these more comprehensive principles ought to be defined on the basis of the natural law approach to morality.

I have also argued that courts are justified in adjudicating on the basis of evaluative, as opposed to nonevaluative, standards of the good. Indeed, not only are courts justified in so doing, they are morally obligated to do so if they are to adequately fulfill their political role of promoting the common good. To the extent that we are hesitant to acknowledge that courts are justified in using evaluative standards we reveal an inadequate understanding of the scope and limits of political authority.

I have discussed the thesis that the legal system can be administered with quantitative or mechanical methods. In that regard I have tried to point to some of the epistemological difficulties inherent in a rigorous application of the Pareto and Kaldor-Hicks standards and have attempted some generalizations about the illusory nature of a solely quantitative method in moral and legal analysis. Ultimately I have claimed that the only justifiable “method” of adjudication is one in which a skilled and wise judge carefully examines the facts, distinguishes the major alternative ways of resolving the issue, tries to foresee the likely social consequences of each alternative resolution, and resolves the case in the way best suited to promote the common good. This, of course, is not a decision procedure. Perhaps what we need most of all is an account of adjudication which leaves us with a good conscience about the inevitable use by courts of their own theories of the common good.

At crucial points I have relied upon the idea that the best justification for judicial reliance upon evaluative standards of the common good consists of an appeal to the desire on the part of judges to contribute disinterestedly to the common good. It may seem paradoxical that I rely upon the possibility of human goodness in the very attempt to justify a certain method of administering coercive rules. Does not the very existence of legal coercion prove illusory the belief that persons can ever be expected to transcend the
limitations of their own narrowly conceived self-interest? The assumption of legal coercion is that individuals must be furnished with external motivations to induce them to comply with practices aimed at promoting the common good, that without the threat of coercion people would not have the common good close enough to their hearts to cooperate. It is true that the presence of legal coercion implies a collective belief in the reality of human evil and narrow pursuit of self-interest. But it is also clear that a coercive legal system such as ours could not, in fact, be administered well or fairly without being applied by judges who are able to get beyond their own self-interest, narrowly defined, and work for the common good. Thus, the fact of human evil and thoughtlessness makes necessary coercive collective practices which, in turn, can function adequately only if some persons, at least some of the time, can work disinterestedly and intelligently for the common good. That this coexistence of good and evil should strike us as a paradox is only the product of a tendency to philosophize in extremes. We are inclined to think that either human beings are wholly evil and narrowly self-interested or completely good and unconcerned with their own pursuits as narrowly conceived. It is true that although we do not demand or expect that judges will be gods in human form, we do expect that they will make a greater and more sustained effort to contribute to the common good than those in wholly private roles. For those who doubt the capacity of human beings to measure up to such demands I can only suggest that they carefully observe the activities of the courts for a substantial period of time.

Finally, it might be thought that my stress on evaluative standards implies that I leave no room for human freedom. That is, it might be felt that the natural law conception of a legal system's proper task as furnishing necessary or useful conditions for the common self-realization of its citizens overemphasizes the role of "conditions" at the expense of the individual's own movements toward self-realization on the basis of his own freedom. But this would be a misunderstanding. In a social context self-realization depends upon two kinds of conditions: first, what might be called "enabling" conditions for individual fulfillment supplied by the social structure in which the individual is embedded and, second, the individual's own efforts. Both kinds of conditions are necessary for self-realization. A political theory which ignores the role of enabling conditions tends to be naively individualistic, with little appreciation of the vital part played by the social context in any
individual's life. On the other hand, a theory which ignores the essential part played by the individual who must take the leap from whatever enabling conditions are offered toward self-realization tends to be naively collectivist in approach, with insufficient appreciation of the fact that in the final analysis no one can reach into another's consciousness and force the latter into realization of the human essence. Furthermore, I do not mean to suggest that the legal system ought to try providing all conceivable enabling conditions for individual self-realization. On the contrary, I believe that the legal system's proper role is to furnish only a relatively small subset of the total set of enabling conditions that are necessary or useful for the free development of individual human powers. The remainder ought to be supplied on the basis of voluntary individual and collective effort. Indeed, one way to understand the subject matter of moral obligation to others is to see such obligations as defining ways in which one can and ought to contribute to the formation and sustaining of enabling conditions for the free self-realization of others. I cannot here work through the problem of drawing the line between those enabling conditions properly supplied by the legal system and those which are better furnished voluntarily, but suffice it to say that I believe a line can be drawn in a principled way on the basis of a natural law theory of the common good.