

The Boundaries of Normative Law and Economics

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Normative law and economics remains controversial decades after its emergence despite its successes in legal scholarship and its similarity to influential approaches in economics. The reason is that many of its proponents have exaggerated its value for policy while discounting other methods, tainting the enterprise. Normative law and economics as a method of policy analysis properly operates within narrow boundaries defined by its four main premises: (1) welfarism based on unrestricted preferences; (2) unimportance of distributional effects; (3) unimportance of impacts on non-welfare values; and (4) rational instrumental behavior of affected persons. Scholars have made progress in normative law and economics by abstracting away from these premises. The most successful work proposes “modular” insights at a middle level of abstraction. But this work can be properly put to use only if the excluded factors are reintroduced into analysis prior to application.

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Introduction

Normative law and economics (NLE) has long faced a paradox. Many of its prescriptions are useful, and the literature is dominant in various areas of law. But the approach remains controversial within law schools. The likely reason for this paradox is that advocates for NLE have exaggerated its value for policy, and made controversial normative and empirical claims on its behalf. Justified skepticism about these claims, and ensuing debates, have tainted the enterprise.¹ In this brief Essay, I suggest a modest approach to NLE that preserves its value as an academic project and avoids reliance on controversial normative or empirical assumptions.

My argument is that the various efforts to offer a comprehensive economic approach to evaluating the law and legal reforms should be abandoned. I argue that a legal analyst cannot avoid the complicated, and often apparently contradictory, moral questions that surround legal reform by stipulating that a single welfarist criterion will be used for evaluating legal reforms. Yet NLE can play a useful role by helping analysts identify superior means for achieving a given goal in settings that are abstracted away from moral, practical, and political questions that will nonetheless have to be answered before a policy is implemented. I call this type of analysis modular—because the results, once established, can be plugged into different policy contexts. The usefulness of the exercise derives from its reliance on mid-level abstraction, which avoids the controversies that surround both concrete policy proposals that produce identifiable winners and losers, and highly abstract debates about moral theory. Where NLE-inspired analysts seek to make a more direct impact on public policy, they should address the non-efficiency-related moral and policy issues.

I make this argument by describing four broad premises of NLE, as it is standardly practiced: (1) welfarism, (2) absence of negative distributive effects, (3) absence of harm to non-welfarist principles, and (4) accuracy of behavioral premises.² Or one can think of these premises as the limits or conditions of the scope in which NLE can make unqualified policy recommendations. NLE scholars should (if they do not already) recognize that these premises are highly contestable, and in each case limit the scope in which NLE can be useful. And because these premises are contestable,

1. Earlier debates about whether law and economics advances a conservative political agenda petered out because, I suspect, many scholars in the field were self-identified liberals and made liberal or left-wing arguments using economic analysis. But the damage has been done. “Law and economics” is emerging in popular discussion as a metonymy for right-wing propaganda funded by plutocrats. *See, e.g.*, KURT ANDERSEN, *EVIL GENIUSES: THE UNMAKING OF AMERICA* 134-35 (2020); JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 130-34 (2016). In response to this onslaught, people who remain committed to law and economics might give thought to how they can shore up their research agenda.

2. Premises (1) to (3) can be thought of as “weak welfarism.” *See* MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 53 (2006).

people can reasonably disagree as to the scope of NLE's utility. I then suggest that while NLE can avoid some of these pitfalls by keeping the analysis general, its usefulness depends on whether the mid-level analysis can ultimately be brought to bear on real-world problems.

I. Conditions for NLE

A. *Welfare*

NLE is generally thought to assume *welfarism*, the view that the well-being of individuals is morally important. This assumption might seem harmless but in fact could have strangled NLE in its crib. The reason is that NLE, like much of normative economics, uses the Kaldor-Hicks efficiency criterion or the Pareto criterion. Most welfarists believe in the diminishing marginal utility of money, which implies that in any society with wealth disparities, the government should redistribute wealth from rich to poor. But both the Pareto criterion and the Kaldor-Hicks criterion block redistributions of wealth. Any transfer makes a party worse off (in violation of the Pareto criterion) or produces a winner who cannot overcompensate the loser from her winnings (in violation of the Kaldor-Hicks criterion).³

As I will discuss in Section I.B., the problem was not solved but avoided through a division-of-labor policy strategy. NLE would be permitted to make efficiency arguments because distributional issues would be addressed by the tax-and-transfer arm of the government. But this still left the question of what exactly we mean by *welfare*, and whether the efficiency criteria maximize it. That question I will address first.

Among philosophers, there are three major positions about the meaning of welfare. First, well-being can be understood as a *mental state* characterized by pleasure or the absence of pain. Bentham understood utility in this way. While this view fell out of favor for many decades, in recent years it has been resurrected by economists who use surveys to measure what they call subjective utility, and has influenced legal scholars and policymakers as well.⁴

3. The 1970s debate over NLE seems to have petered out over this conundrum. See, for example, *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); especially Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980); and Lucian A. Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671 (1980).

4. See, e.g., JOHN BRONSTEEN, CHRISTOPHER BUCCAFUSCO & JONATHAN S. MASUR, *HAPPINESS AND THE LAW* (2015).

Second, well-being can be understood in objective terms—to refer to capacities, actions, or states of being like receiving adequate nutrition, enjoying family life, receiving intellectual stimulation, and the like.⁵ *Objective-good* accounts have played a role in the development of international indicators for quality of life across countries.

Third, well-being can be understood in terms of choice or *preference* (or *desire*). People do well when they make choices for themselves within their budget constraints. This is the standard view in economics, which assumes that when a person makes a choice, her well-being (“utility”) increases relative to the alternative. While some philosophers connect well-being to choice, they require preferences (they usually use the term *desires*) to be well-informed and undistorted by social conditions—for example, an addict’s choice to take drugs does not necessarily enhance her well-being.⁶

NLE nearly always relies on the economic definition of utility, which virtually all philosophers reject. This is a source of considerable skepticism in law schools and elsewhere about the prescriptions of NLE.

Consider, for example, debates about taxes or prohibitions on goods or services that may be bad for people—sugary foods, addictive drugs, pornography, and so on. Under the unrestricted preference view used by NLE, the debate is simply bizarre. A tax on sugary foods reduces welfare by redirecting consumption from a desired good to a less desired good. Under any of the philosophically mainstream views of welfare, the debate is comprehensible, and in fact difficult. One might believe that people should be deterred from eating sugary foods because they misjudge the hedonic benefits (especially, the long-term harms), they would prefer not to consume that food if they fully understood its effects, or they should exercise more self-discipline by avoiding empty pleasures. The complexity of these debates, and the long history of substantial public efforts to curtail these types of behavior, suggests that the unrestricted preferences view is far too simple.

NLE is based on a bet that actual preferences are closely enough correlated with actual well-being (however understood) that the methodology is sufficiently accurate in general conditions, or at least in certain identifiable settings. To be sure, this bet may be a good one: we might think, for example, that the preferences of (at least) sophisticated persons will approximate their undistorted preferences, or the objectively correct preferences, whatever they might be; and that satisfaction of these preferences will bring about happiness as well. The market system is based on the same bet, and NLE is powerful because it draws on the credibility of the market

5. See, e.g., AMARTYA SEN, DEVELOPMENT AS FREEDOM 147-48 (1999); MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE 284-91 (2006); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011); James Griffin, *Welfare Rights*, 4 J. ETHICS 27 (2000).

6. For a discussion, see Chris Heathwood, *Desire-Fulfillment Theory*, in THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF WELL-BEING 135 (Guy Fletcher ed., 2016).

system. That is why NLE generally assumes that state intervention is proper only if there is a “market failure.” But the market may have less credibility these days than it used to have. If we thought that the market normally produces outcomes that do not advance well-being, we would be as concerned as much about market success as market failure.

B. Distribution

As noted earlier, most welfarists believe that, all else equal, wealth differences should be minimized because of the diminishing marginal utility of money. Thus, distributive justice can be seen as an implication of welfarism rather than an independent moral goal. In the public finance literature, it is standard to begin with welfarist premises, and assume that the goal of policy is to balance the benefits for welfare of redistributing wealth to the poor and the efficiency (and hence welfare) costs of doing so, typically understood as resulting from the weakening of incentives to work.⁷ Non-welfarists also frequently believe in distributive justice—that wealth differences should not be too great as a matter of morality and public policy. For present purposes, I abstract away from the question whether distributive justice is best understood in welfarist or non-welfarist terms.

Economists in the welfare economics tradition have long struggled with the problem of distribution. As noted above, the efficiency criteria not only disregard distributive effects, but in fact block relatively uncontroversial redistributive projects. The story is long and complicated, but eventually two approaches became common. First, mainly outside the public finance literature, economists tend to make normative proposals based on Kaldor-Hicks (or sometimes Pareto) efficiency while explicitly leaving open distributive issues. In one common formulation, the normative economist is an “advisor” who proposes efficient projects to the “policymaker” but acknowledges that the policymaker may choose to reject the projects because of adverse distributional effects that lie outside the expertise of the economist.⁸ The other approach, which has become dominant in public finance but remains controversial, is to stipulate a social welfare function (or a class of social welfare functions) with relatively appealing distributional properties (that is, that treats everyone as equal and builds in quasi-egalitarian assumptions). The policy proposals that emerge from this approach reflect a compromise between efficiency costs and distributional costs, both understood in welfarist terms.⁹

7. See Thomas Piketty & Emmanuel Saez, *Optimal Labor Income Taxation*, in 5 HANDBOOK OF PUBLIC ECONOMICS 391 (Alan J. Auerbach et al. eds., 2013).

8. The debate is described in ADLER & POSNER, *supra* note 2. For a recent contribution from within economics, see Stephen Coate, *An Efficiency Approach to the Evaluation of Policy Changes*, 100 ECON. J. 437 (2000).

9. Piketty & Saez, *supra* note 7. As the authors discuss, some models also incorporate non-welfarist moral assumptions.

Most NLE scholarship makes a stronger claim: that the policymaker should herself disregard the distributive consequences of a project and (in effect) go ahead and implement the efficient project proposed by the advisor because distribution will be taken care of by the tax-and-transfer system. More formally, “legal rules” (technically, rules that affect incentives to take care, invest, rely, and engage in other actions beyond the choice whether to work or consume leisure) should maximize “efficiency” (and, in the typical case, the Kaldor-Hicks criterion) while redistribution should be accomplished through the tax and transfer system (that is, rules that solely affect the choice between work and leisure and generate revenue that fund public projects or is distributed to the public). The argument, in a nutshell, is that under reasonably general conditions¹⁰ a liability rule that redistributes wealth to the poor will distort both the incentive to work and the incentive to avoid harm, while an efficient legal rule joined with taxes-and-transfers will distort only the incentive to work. This argument originated in the 1970s with Hylland and Zeckhauser,¹¹ and has been most vigorously advanced, as well as refined and expanded, by Kaplow and Shavell.¹²

The significance of the argument is that it shows how economists can contribute to public policy even though they (by concession) have nothing to offer to distributive questions. An institutional division-of-labor is asserted, with economists occupying the role of efficiency experts, and others (policymakers?, voters?, moral philosophers?) offering advice or making judgments about distribution. This approach provides a defense of NLE against those people who, on welfarist or non-welfarist grounds, believe that government policy should help the poor.

As Kaplow and Shavell acknowledge, the argument is not based on the Pareto principle. If we are evaluating a single project, it is highly unlikely that the tax system will redistribute the gains from that project’s winners to the losers. Thus, there is no claim that the tax system ensures that a non-Pareto project evaluated in isolation has an overall Pareto-superior impact. The way to think about this approach is to imagine that an equilibrium distribution of wealth is enforced by the incumbent tax-and-transfer system as more or less fixed, and ask whether an efficient project advances welfare. It might, of course—either because its distributive effects are favorable (independent of, or thanks to, taxation of wealthy beneficiaries). But it might not—if the distributive effects are sufficiently harmful despite

10. How general they are is contested. See Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000).

11. Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCANDINAVIAN J. ECON. 264 (1979).

12. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994). For a lucid restatement, see David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439 (2003).

the hypothesized reverse pressure of the tax-and-transfer system. Or: a redistributive project outside of the tax-and-transfer system may advance welfare (by shifting money from rich to poor despite the efficiency cost) or it may not (because the efficiency cost is so large, or because a legislature reverses the project in order to maintain the status quo distribution of wealth).¹³ Moreover, a legal rule that redistributes could be justified on welfarist grounds despite its inefficiency because the incumbent tax-and-transfer system is even more inefficient in its design or operation—it consumes enormous resources to move a dollar from person *A* to person *B*.

For a timely example, consider the possibility that firms will develop a COVID-19 vaccine or cure, and will sell doses only to the highest bidders. Put aside externality-related questions, and assume that the government considers a project that would ration the doses or cures. From a welfarist standpoint, it seems plausible that the poor—who live in more crowded conditions, have worse access to medical care, and more frequently suffer from comorbidities than wealthy people do—would benefit more from the product than the wealthy would. But the wealthy will outbid the poor, so the rationing project would fail the test of efficiency. Kaplow and Shavell’s framework implies that we should oppose the rationing project, period. We should instead advocate market allocation.

One way to see why is to recognize that the poor would want to sell their doses back to the wealthy and take their chances with illness and death. So why should the government give the doses to the poor in the first place? The only response is that this is an odd but perhaps defensible way to redistribute wealth to the poor. The onset of the pandemic was also an economic shock that harmed lower-income workers—many of them essential workers who exposed themselves to considerable risk—much more severely than wealthier people. Distributing vaccines by lottery or favoring poorer people—rather than allocating them via the market—may seem fair under the circumstances, and perhaps more politically feasible than taxes and transfers because that sense of fairness may be broadly shared. That would be a sufficient reason for preferring a lottery or rationing system to a more efficient alternative.¹⁴

And yet it also true that a project for distributing a vaccine or cure should reflect efficiency considerations. Imagine that a project for distributing a vaccine in a distributively just way is more expensive than an alternative feasible project that would distribute the vaccine to the same people. The only basis for rejecting the initial project is efficiency—and that seems like a good basis for rejecting it.

Call this argument the “division-of-labor” justification for NLE. NLE identifies the efficiency costs of potential projects but no more. The overall

13. See Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016).

14. As pointed out by Coate, *supra* note 8, in the more general context; and Fennell & McAdams, *supra* note 13, with respect to the Kaplow/Shavell view.

moral value of the project approved on efficiency grounds remains uncertain until distributional analysis is completed. Kaplow and Shavell too hastily dismiss the possibility that inefficient legal rules that redistribute may be justified as the only feasible way to enhance welfare. But a role for NLE remains intact. The NLE analyst, like one of Adam Smith's pin workers, tinkers with some of the features of a proposed project or mechanism, then sends it down the assembly line where others bring to bear their expertise. The finished product will reflect a range of judgments.

C. Non-Welfare Moral Norms

NLE has frequently been criticized by legal scholars and moral philosophers who either reject welfarism, or believe that non-welfarist moral principles and welfarism should jointly determine public policy. NLE has, for the most part, ignored these criticisms, but three justifications for disregarding (or, as we will see, minimizing) non-welfarist principles can be identified.

1. Non-welfarist moral principles are wrong; welfarism comprehensively accounts for the proper moral objectives of policymakers.

2. Non-welfarist moral principles may be valid but only because they are ultimately derived from welfarist premises.

3. Non-welfarist principles may be reflected in people's preferences, but the principles should not guide policy except to the extent that people with non-welfarist preferences are willing to pay to override policy based on efficiency.

To understand these distinctions, consider the widely-held moral intuition that people should be forbidden to sell their own body parts, including kidneys. The law in the United States and virtually every other country enforces this norm. Some economists have argued that sales of kidneys should be lawful.¹⁵ Many people suffer and die because of kidney failure; if these people were allowed to purchase kidneys from healthy people for a price that those healthy people were willing to accept, welfare would increase. And because healthy people have two kidneys, they can spare one of them without suffering significant adverse health effects—as has been demonstrated by the willingness of people to make uncompensated donations of a kidney, usually to relatives.

People's "fairness" intuitions are often very powerful, and they frequently contradict the results of economic analysis based on welfarism.¹⁶ It is easy, using welfarist principles and simple behavioral models, to believe

15. Gary S. Becker & Julio Jorge Elías, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, 21 J. ECON. PERSP. 3 (2007).

16. An influential strand of social choice theory devoted itself to showing that non-welfarist values (e.g., opposition to dictatorship, commitment to personal autonomy) cannot be reconciled with Pareto efficiency, so that social welfare functions that included both resulted in paradoxes. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

that tort victims should not be paid compensation by wrongdoers (because private insurance is more efficient than state-mandated payments); that punishments for serious crimes should be less severe than punishments for less serious crimes (where the less serious crimes are harder to detect); that fraud should not be punished under certain conditions (where it enables a person to obtain a return on a socially valuable investment); and that all kinds of contracts that people regard as morally objectionable—sales of body parts, sales of oneself into slavery, prostitution, drug deals, and so on—should be permitted. There are many more examples where “fairness” intuitions are subtler and more open to debate, including whether sellers should be allowed to overcharge unsophisticated buyers, how free people should be to choose their contracting partners, and (to use a recent example) whether people should be allowed to raise prices for necessary items during an emergency, such as a pandemic. In these cases, norms about treating people fairly may conflict with market norms that protect investment and celebrate free choice. While welfarists may believe that market norms should prevail, ordinary people do not always agree—and the law seems to embody compromises rather than permit one set of norms to prevail consistently.

Moral repugnance toward the sale of kidneys persists despite cogent arguments from economists that the ban results in needless suffering and death. That leaves three responses for the committed welfarist. First, one can argue that the norm is morally wrong just because it violates welfarism. This is a philosophical argument about the merits of welfarism, one that remains unresolved after hundreds of years of debate. Second, one can “welfarize” the norm by arguing that, despite appearances, it advances welfare. A common version of this argument is that if people were allowed to sell their kidneys, many poor people would do so against their own interest.¹⁷ Note that this argument leaves open a possible efficiency-based response—for example, that kidney sales should be permitted after the seller receives counseling or that they should be permitted if the seller is not poor. Third, one can treat the allegedly moral norm against selling of body parts as merely a preference for a certain type of outcome—the absence of kidney sales. If people are willing to pay to block kidney sales, then kidney sales do reduce welfare—not necessarily of the seller, but of third parties—and so the question is one of accounting the costs and benefits on both sides.

17. DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS* (2010). Welfarizing arguments are common in law and economics. One strand of literature argues that social norms that many people regard as morally compelling are efficient or welfare-enhancing. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). For criticisms, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000). In other areas of law, scholars often argue that “moral” norms advance efficiency.

In a 2002 book entitled *Fairness Versus Welfare*,¹⁸ Kaplow and Shavell make the first and third arguments (and possibly the second as well). Drawing on the social welfare function tradition in welfare economics, Kaplow and Shavell argue that policymakers should attempt to maximize a social welfare function and, to do so, they should choose Kaldor-Hicks-efficient policies.

Kaplow and Shavell's defense of their position is a demonstration that policies based on welfare generate more welfare than policies based on non-welfarist moral principles (what they call "fairness" principles)—a tautological exercise, as they acknowledge. Perhaps the justification for this strategy is that it makes clear how, in an enormous range of legal contexts, a consistent refusal to bend to welfarist considerations could, in aggregate, generate enormous losses for society. Kaplow and Shavell seem to think that once people are exposed to these potential losses, they will abandon their non-welfarist moral commitments. But philosophers have understood this tradeoff for hundreds of years, and ordinary people seem to as well. Consider the taboo on the sale of kidneys and other human organs. People who defend that taboo are aware that it blocks welfare-enhancing transfers.¹⁹

In fact, Kaplow and Shavell do not exactly argue, despite their rejection of "fairness" principles, that those principles should be disregarded. They argue instead that preferences for fair outcomes should be incorporated into the social welfare function—the third approach described above. Moral commitments become preferences—they have the same methodological status and hence moral weight as preferences for the consumption of goods and services. If people are willing to pay enough to block deception, torture, or invidious discrimination, then the state will honor those preferences even if otherwise those practices advanced welfare.

This style of welfarizing non-welfarist principles is actually a rejection of them. People on both sides of the abortion debate agree that the rightness or wrongness of abortion does not depend on aggregate willingness-to-pay. Moreover, Kaplow and Shavell do not try very hard to show that a policymaker can elicit valuations about people's moral objections to policy reforms under consideration. There is a long history of skepticism among economists about this type of exercise,²⁰ and there are complex conceptual, as well as methodological, issues because people will often state very strongly their support for a general moral principle but then under further questioning disclose (or realize, as a result of argument and introspection) that their moral judgments depend on context. Accordingly, even if Kaplow and Shavell are right that non-welfarist principles should be treated like consumption goods, policymakers might do better by relying

18. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002); *see also* LOUIS KAPLOW, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* (2008).

19. *See, e.g.*, SATZ, *supra* note 17.

20. *See* CONTINGENT VALUATION: A CRITICAL ASSESSMENT (J.A. Hausman ed., 1993).

on their own moral intuitions—or engaging in moral debate with their colleagues and members of the public, so as to refine and strengthen those intuitions—and incorporating those moral principles into the policies they implement. That approach may work better than trying to elicit the public’s willingness to pay.

A vivid illustration of this point is Alvin Roth’s celebrated work on kidney exchanges.²¹ Suppose a person would be willing to donate a kidney to a relative or friend but lacks a compatible immune system. Under Roth’s approach, other non-matching donor/donee pairs are identified, so that each donor can donate to an immune-compatible stranger while ensuring that the desired donee obtains an immune-compatible kidney as well. A person cannot sell her kidney for money, but she can barter her kidney for a promise from someone else to alienate *his* kidney to a person selected by a donor. Elaborate chains are constructed, often involving dozens of people. The chains are complicated and fragile—the entire chain collapses if one donor withdraws—and certainly less efficient than a regulated market for kidneys would be. Yet because moral prohibitions on the sale of human organs block the sale of kidneys for a price, the less efficient non-price market is used. In other work, Roth proposes a theory of “repugnant transactions” that, he argues, economists should treat as constraints when they make normative proposals. While some of these taboos probably can be defended on welfarist grounds (e.g., bribes and kickbacks), others more likely reflect Kantian values (e.g., prohibitions on dwarf-tossing and other demeaning activities, on indentured servitude and other forms of voluntary slavery, on transactions that discriminate against various groups, and so on).

All of this suggests that NLE proposals will be most successful—most persuasive to the most people, and most likely to be implemented—in domains of policy where the non-welfarist principles happen to be weak. Alternatively, NLE scholars may be able to obtain broader acceptance for their proposals by incorporating non-welfarist principles directly into the analysis. There is some NLE scholarship, for example, that attempts to show that legal rules or reforms comply with non-welfarist legal norms as well as efficiency criteria.²² But this kind of effort seems to be in its infancy.

D. Behavior

Welfarist-inspired moral philosophy (for example, the work of Peter Singer) is not the same as NLE: what is distinctive about NLE is that it

21. See Alvin E. Roth, Tayfun Sönmez & M. Utku Ünver, *Efficient Kidney Exchange: Coincidence of Wants in Markets with Compatibility-Based Preferences*, 97 AM. ECON. REV. 828 (2007).

22. See, e.g., Ariel Porat, *The Many Faces of Negligence*, 4 THEORETICAL INQUIRIES L. 105 (2003).

joins welfarist normative premises with the behavioral premises of economics. Much of the skepticism about NLE is derived from skepticism about the underlying behavioral premises: that people respond to incentives as consistently as assumed by economic theory, and at the level of precision that economic theory implies.

Consider, for example, the analysis of self-reporting in Kaplow and Shavell's *Optimal Law Enforcement with Self-Reporting of Behavior*.²³ The paper addresses the questions of whether and how wrongdoers should be encouraged to report their wrongdoing to the government. The problem arises outside the standard tort setting where the victim knows that she has been injured by a wrongdoer, and reports that wrongdoing to the government (the police, or a court via a lawsuit) to obtain protection or collect damages. When victims do not know the identity of the wrongdoer, or do not know they have been harmed, the government must conduct an "audit," that is, monitor the behavior of potential wrongdoers. Governments audit taxpayers, banks, factories, and many other people and entities, but auditing is costly. It would be better if the wrongdoers could be induced to self-report.

Kaplow and Shavell construct a model in which a single agent may take an action that harms another agent. The government incurs a cost to audit possible wrongdoers, and by incurring a higher cost, may increase the probability of catching a wrongdoer. If a wrongdoer is caught, a sanction is imposed, which is assumed to be the wrongdoer's entire wealth. With no self-reporting mechanism, the government should choose an audit rate that rises with the harm and falls with the enforcement cost. With a self-reporting mechanism, the government can reduce enforcement costs without reducing deterrence. The maximal sanction will be imposed on anyone who fails to self-report and then is subsequently audited (which deters people from failing to self-report) and a sanction equal to the audit probability times the maximal sanction is imposed on anyone who commits the wrongdoing and reports it (which deters people from committing the wrong).

The paper makes an elegant argument but its major analytic contribution depends heavily on the behavioral assumptions being right. Sometimes, they will be. Managers of corporations from time to time discover that employees have committed crimes for which the corporation will be punished if the crimes are discovered. The corporation decides whether to report those crimes to the government or to conceal them. A self-reporting mechanism may well give the corporation the optimal incentive both to disclose criminal activity of employees and to discourage that activity in the first place. Corporations have the institutional capacity for understanding the legal regime and estimating the payoffs from complying with it. (And also for gaming it—but that is another story.)

23. Louis Kaplow & Steven Shavell, *Optimal Law Enforcement with Self-Reporting Behavior*, 102 J. POL. ECON. 583 (1994).

But will a self-reporting mechanism work in the same way for ordinary people—for example, taxpayers who must decide whether to report to the government errors (or deliberate tax violations) that they committed in the past? Or for plea bargaining, which is another version of the self-reporting mechanism? It is hard to say. NLE makes strong assumptions that people are responsive to incentives. But evidence is mixed as to how well people respond to incentives, and we do not know whether (for example) the self-reporting mechanisms will work well or poorly in the tax or plea bargaining settings. Indeed, there is limited evidence that people respond predictably to the threat of criminal sanctions, and none at all (as far as I know) that they appropriately calculate the risks and benefits when confronted with a plea offer. NLE incorporates a bet: the bet that people are sufficiently responsive to incentives, so that the sometimes complicated mechanisms proposed by NLE scholars aren't lost in noise.²⁴

Lurking in the background is the broader question of the stability of preferences. Economic theory assumes that preferences for goods, services, and outcomes remain stable for the duration of the period of analysis. That assumption is reasonable in a range of conditions; for example, if one seeks to predict the impact of a commodity tax on the price of tomatoes. The assumptions become more questionable as one broadens the inquiry.²⁵ Tastes do change, often in unpredictable ways. If one follows Kaplow and Shavell and treats non-welfarist moral principles as “tastes,” one can see why the NLE approach discomfits so many people. Attitudes toward sexual minorities, for example, have undergone a revolutionary change over the last several decades in the United States. Standard economic theory would treat a policy proposal to benefit sexual minorities (for example, recognition of same-sex marriage) as simply a transfer of resources from one group of people to another group of people, while most people involved in the debate saw it as a way of changing attitudes (that is, “preferences”). People rarely argue seriously about consumption tastes (whether one should like chocolate ice cream or not) but argue all the time about moral “tastes” (whether abortion is wrong or not), and they do so with the expectation that they can change minds. A method that rules out this expectation needs a stronger justification than has been offered.

NLE's traditional behavior assumptions—that people are adept at instrumental rationality—have been challenged over the last few decades by

24. Kaplow (along with Scott Duke Kominers) made just such an argument against a mechanism I proposed with Glen Weyl in ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* (2020). See Louis Kaplow & Scott Duke Kominers, *Who Will Vote Quadratically? Voter Turnout and Votes Cast Under Quadratic Voting*, 172 *PUB. CHOICE* 125 (2017).

25. Becker and Stigler attempted to evade this limitation by assuming that people's preferences were largely similar and indefinitely stable, so apparent changes in preferences were really due to changes in budget constraints, opportunities, and the like. George J. Stigler & Gary J. Becker, *De Gustibus Non Est Disputandum*, 67 *AM. ECON. REV.* 76 (1977). Their argument has been met with considerable skepticism. See, e.g., Tyler Cowen, *Are All Tastes Constant and Identical?: A Critique of Stigler and Becker*, 11 *J. ECON. BEHAV. & ORG.* 127 (1989).

behavioral economists, who argue that people are boundedly rational. It is widely understood that behavioral economics challenges the predictions that are generated from rational-choice models. But behavioral economics also challenges normative economics and NLE by suggesting that, even if their welfarist principles are correct, reforms that enhance efficiency based on traditional economic models could instead generate perverse outcomes as people react unpredictably to those reforms.

II. Implications

A. NLE in General: Modularity and Mid-Level Abstraction

The conditions in which NLE may usefully operate may seem so stringent that some readers might think that the scope of NLE is nil. But that view is too pessimistic for reasons I have already suggested—that NLE plays a useful role in a larger policy-analysis division-of-labor.

Consider again Kaplow and Shavell’s analysis of the self-reporting mechanism. One can appreciate the paper’s insights without worrying too much about evaluative criteria, or even (within limits) philosophical issues. At the level of abstraction at which the argument proceeds, even a Kantian will agree that the government should not waste enforcement resources. However, because the argument is presented at an abstract level, difficult moral and political questions surrounding real-world implementation are avoided, not resolved. There are, for example, serious moral concerns about imposing a “maximal sanction” (all of someone’s wealth) or a very large sanction for failing to self-report a tax violation, say. It also may be regarded as unfair if a self-reporting regime is used in some settings but not in others—for example, if, in practice, wealthy or connected people are more likely to take advantage of it than other people are. Plea-bargaining may be condemned for causing humiliation or praised for inciting self-reflection—neither of which value plays a role in a standard welfare analysis.

So we can see both an advantage and a cost to Kaplow and Shavell’s method. The results for self-reporting regimes can be applied in a wide range of contexts (criminal law, tax law, tort law, and the internal organization of institutions like employers and government agencies), and any good analyst should be prepared to use their ideas if a policymaker seeks to implement a new audit regime. In this sense, the analysis has a modular feel—the modular nature of the insight comes from its abstraction from real-world settings, and that is what gives the insight its power. But when it comes time to apply it, and moral and political questions come to the fore—this is when the insights of economic analysis begin to be overtaken and eventually drowned out by philosophical, political, or practical concerns.

Another way to think of the contribution is as “mid-level” rather than modular. Mid-level refers to the degree of abstraction—to the extent the

winners and losers of a policy are identified. At the lowest level, consider projects implemented by regulatory agencies. When the EPA considers an environmental regulation, it identifies the winners in terms of demographic categories (e.g., people who live near a water source, or pregnant women, or small children, or people with asthma), and losers (usually, consumers who must pay higher prices). It then conducts a cost-benefit analysis. Because the winners and losers are identified, the distributional effects of the regulation can be estimated, and other non-welfarist concerns may become visible (e.g., the distributional impact on racial groups, which may raise concerns about equality or coercion). These low-level projects are inherently controversial, and may require (as I argue below) complex moral evaluations.

On the other hand, high-level projects involve reforms of basic institutional commitments. Is the market good or bad? Should we favor the state system or strive for world government or open our borders? Should immigrants be encouraged to assimilate or retain their cultural identities? These questions, while highly abstract, are extremely controversial because the answers could affect millions of people.

NLE scholarship (as well as related work by economists in economics journals²⁶) is most successful when it addresses mid-level projects. Not just self-reporting, but also other modular policy tools that are used in many different contexts: rules versus standards, government enforcement versus private enforcement, individual actions versus class actions, liability rules versus property rules, and so on. The questions that arise are often instrumental in nature, and moral intuitions and philosophy typically have little to say about them. Ironically, at the lower level of abstraction at which NLE begins to run into problems, one finds disputes over substantive legal rules: strict liability versus negligence, expectations damages versus specific performance, the death penalty, gun control, liability for invidious discrimination. Here, where non-welfarist intuitions intrude, economics can still make claims about the welfare effects of different possible approaches, but economics as such has nothing to offer beyond that.

26. Economists tend to avoid, or say that they avoid, normative pronouncements in their scholarship. The taboo against normative arguments can be found in the NBER bylaws, which forbids the publication of papers under NBER's auspices if they make policy arguments. Many economists will also tell you that they do not, or should not, make policy arguments in academic journals. However, there are fairly common exceptions. In public finance, economists often use a social welfare function that incorporates distributional weights; this is especially common in the tax literature. *See* Piketty & Saez, *supra* note 7. Outside public finance, economists often publish articles that identify an externality and address (usually superficially) how it might be corrected through policy. One also finds empirical papers in other areas, for example, the economics of crime, that analyze policies and criticize them because of their effects on public values, for example, the avoidance of racially discriminatory outcomes. *See, e.g.,* Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191 (2018). Finally, the literature on mechanism design makes policy proposals, usually based on efficiency but sometimes subject to moral constraints. *See, e.g.,* Roth et al., *supra* note 21. All of this work is at least partly abstracted from real-world conditions.

B. Cost-Benefit Analysis

One of the most significant areas of policy in which the division-of-labor justification operates is in the area of administrative regulation. In the United States, many regulatory agencies use cost-benefit analysis to evaluate regulations and other projects. Agencies do not incorporate distributional weight into their cost-benefit analyses. While they occasionally address broader moral issues, only cost-benefit analysis is used systematically, as required by a series of executive orders.

The best defense of this practice is that agencies operate within a broader institutional structure that assigns distribution and controversial moral questions to a politically responsive body (Congress) and delegates “technical” functions to quasi-autonomous bodies (agencies). Distribution is not delegated to a single “distribution agency” or to the existing group of specialized agencies because distribution is politically controversial. Nor are non-welfarist moral questions. But there are many settings in which Congress is able to establish a general goal (a cleaner environment, a stable money supply, safe workplaces) and vest in agencies a relatively technical function of achieving that goal at least cost. The social consensus that leads to the legislation may carry through and support agency action that stays within the scope of the legislation. Cost-benefit analysis is the vehicle for accomplishing this task.

The basis of the argument is not the double-distortion argument of Kaplow and Shavell, but the allocation of expertise and political legitimacy.²⁷ EPA is required to comply with cost-benefit analysis but that does not mean it should abandon environmental projects and start regulating workplace safety if it determines that workplace externalities are far greater than environmental externalities. EPA is not an efficiency agency; it is an environmental agency. And EPA should not normally take into account distributional considerations because, if it does, it might lose the confidence of Congress and possibly the public. Moreover, if all agencies take into account distributional effects, but make different distributional judgments, they might end up undermining each other’s distributional goals. In the administrative setting, Congress may reasonably seek to give technical authority to agencies but not the power to redistribute wealth—both because agency officials lack the political legitimacy and expertise, and because they might act inconsistently with each other.

That said, it would be a mistake for agencies to disregard distributional and non-welfarist moral considerations altogether. There are two reasons. First, certain major agency actions could have a significant unfavorable distributional impact that will not realistically be corrected by Congress even in part. Because agencies do not have the power to tax and

27. *But see* Hanoch Dagan & Roy Kreitner, *The Other Half of Regulatory Theory*, 52 CONN. L. REV. 605 (2020) (envisioning a more expansive role for agencies).

transfer, the preferred alternative—efficient regulation plus transfer—is not feasible (unless one can reliably ask Congress for help). There remains a problem of coordination; ideally, agencies would be given guidance so that they do not act at cross purposes. The Clinton and Obama administrations instructed agencies to take into account the effects of their regulations on equity, but these instructions were vague and had no discernable impact.

Second, agencies need to be cautious about using economic tools that may violate moral principles. An important example is the use of a constant value of a statistical life (VSL) rather than a VSL that varies with actual willingness to pay, which would imply lower VSLs for poorer (and possibly older) people. In markets, wealthier people are free to purchase higher-quality safety equipment and medical care than other people can afford, and the logic of efficiency would compel that the government require, through regulation, that industry offer greater health and safety benefits to wealthier people than to poorer people. It is not clear that there is a defensible moral principle that allows unequal health outcomes in the market but prohibits them when the government “completes” the market through health and safety regulation, but such a principle is likely necessary to maintain the legitimacy of, and public support for, agency action.

C. Futility Arguments

Another area in which NLE can be useful is in the generation of what I will call “futility arguments.” A futility argument is an argument that a project will simply not achieve its goal, and will probably generate some cost as well. Futility arguments are powerful because they do not depend on *any* normative assumption (with an exception discussed below). Utilitarians, Kantians, Christian Scientists, Maoists, and virtue-ethicists should all agree that a policymaker should not implement a project that produces no effect except waste. But futility arguments come with a price: heavy reliance on the behavioral conditions of NLE, which do all the work in futility analysis. They need to be accurate for the problem at hand. And those conditions can be very strong.

Futility arguments are familiar and come in many flavors. One futility argument is that a minimum wage (above a certain level) produces no benefit because employers will fire their workers and shut down business rather than raise their wages. If the goal of the minimum wage law is to enhance the well-being of workers, the law is, on this view, futile. The so-called Laffer curve makes a similar argument: a tax rate above a certain level will produce less revenue than a lower tax rate because people will stop working and earning income. Futile projects fail all the welfarist criteria I have discussed; but as I said, they also fail evaluative criteria outside economics.

The exception is that certain religions and moral systems do allow for casuistry (understood in the non-pejorative sense). Consider, for example, a project that bans interest on all loans—a project that was in force throughout much of history in Christian countries, and continues to be in force in Muslim countries. This project could be regarded as futile, at least for certain types of credit transactions, because it is relatively easy to construct economically identical transactions (for example, by selling and leasing back property at rental rates that incorporate an implicit interest payment).²⁸ If the goal of restrictions on interest rate is to prevent loans at interest, then these restrictions are futile. However, in these religious and moral systems, where formal types of behavior are prohibited but functional equivalents are allowed, futility arguments may not be persuasive.

Casuistic projects lie outside mainstream policy analysis in the United States, which is—to the contrary—obsessed with blocking such evasions, also known as regulatory arbitrage. Economists and NLE scholars have been at the forefront in developing futility arguments even though, as I have explained, futility arguments do not depend on welfarism or any other normative systems associated with economics. The contribution of economic analysis is the identification of the behavioral response to a proposed project, implying (though this hardly requires sophisticated economic technique) that the response is inconsistent with the stated goal of the project. As I said, these arguments are common. Giving food stamps to poor people so as to improve their health is futile if they trade them away on the black market for drugs. Integrating schools or neighborhoods with legal rules or subsidies is futile if white people move away. Gun control for crime prevention is futile if people use guns to defend themselves rather than kill others. And so on.

Futility arguments are valuable when they are successful because they tell policymakers that some superficially attractive projects should be ruled out. The arguments do not tell policymakers what to do instead, but we should not be contemptuous of arguments that help policymakers avoid errors. Unfortunately, futility arguments have a long history of abuse.²⁹

The most famous and most frequently abused futility argument (or class of futility arguments) is the Coase theorem. One version of the Coase theorem—a contrivance of George Stigler, based on Coase's paper, *The Problem of Social Cost*,³⁰ which offers some insightful criticisms of Pigouvian taxes—says that legal rules do not affect outcomes if people can trade their entitlements at low or zero cost. A less ambitious version says that legal rules can change outcomes, including the distribution of wealth, but

28. See, e.g., HARRIS IRFAN, HEAVEN'S BANKERS: INSIDE THE HIDDEN WORLD OF ISLAMIC FINANCE (2015).

29. As recounted in ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991).

30. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

cannot push outcomes away from efficiency if people can trade their entitlements at low or zero cost. The first version says that if transaction costs are low, all legal interventions are futile; the second version says that all legal interventions that seek to improve efficiency are futile.

In one of Coase's well-known examples, sparks from a railroad cause fires on land abutting the railroad tracks. Coase argues that a naïve Pigouvian response to this problem would require the railroad to pay damages to the landowners. However, it is possible that the land next to the tracks is worth more if used to absorb sparks rather than grow crops. If so, then the railroad will buy back the right to emit sparks on the land, returning us to the status quo. The "legal rule" that imposes Pigouvian taxes on the railroad—interpreted as shifting the right to use the abutting land from railroad to landowners—does not affect behavior.³¹ It may affect distribution, but not necessarily in a desirable way (since the landowners may be wealthier than the railroad shareholders).

I say that the Coase futility argument has been abused because the conditions in which it operates are unlikely to occur in the real world. Bargaining—even two-person bargaining—is always costly. And if transactions and/or information costs were ever zero or close to it, then markets are unnecessary; the government can simply allocate resources to their most efficient owners via planning.³² However, other futility arguments, within more specific domains, can carry the day.

D. A Note on the Differences Between Moral and Political Constraints

I have so far lumped together several different kinds of norms: (non-welfarist) moral, social, and political. All of these norms constrain policy that might otherwise be based entirely on welfarism, but they constrain it in different ways, and these differences may be important for policymakers. I will here briefly discuss the difference between a moral and social norm, and leave political norms for another time.

A moral norm—and, again, I am focusing on non-welfarist moral norms—is relevant to the normative value of a project but not necessarily its feasibility. Roth's kidney exchange system may be *good*—better than a market in kidneys—because it does not violate a norm against the sale of body parts while otherwise advancing welfare. The policymaker who seeks to implement *good* policies may therefore rely on Roth's proposal. But if the public does not care about good or bad, and the policymaker prefers to implement a policy that has political support, she may disregard Roth's proposal.

31. In fact, real Pigouvian taxes (damages) obviously would not affect behavior. The railroad would simply pay the taxes and continue causing fires. The more surprising implication of the Coase theorem is that a legal rule that prohibited rather than merely taxed the emission of sparks would not affect outcomes because the railroad would buy an entitlement to send sparks onto the land.

32. Cf. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

A social norm may not reflect morality but nonetheless constrains behavior. A social norm might be sustained because people have a natural tendency to conform their behavior to the patterns of behavior of others, or because they seek to coordinate their behavior so as to obtain opportunities, or because they hope to preserve a pro-social reputation—there are many other possibilities as well.³³ Social norms can be evaluated from the standpoint of morality; we might, for example, disapprove of racist norms that prevail in many communities, or puzzle over norms that limit prices or interest rates, or disapprove of norms that require people to practice apparently senseless rituals.

A policymaker may consider herself bound by social norms because she needs political support—but she may also believe that she should try to break down these norms because they violate moral principles (welfarist or non-welfarist). Roth's system might be attractive because it avoids a violation of a social norm against the sale of body parts; but if this social norm is morally senseless, a policymaker might try something else. For a more familiar example, policymakers have frequently tried to erode racist social norms for moral (or political) reasons. Truman's order desegregating the army in 1948 is one example, but one could think of the range of laws and regulations that forbid racial discrimination and prohibit racial integration in the same light.

The complexity of social and moral norms poses conundrums for policy analysts and policymakers alike. It is relatively easy to identify social norms (though often difficult to determine whether they are robust or fragile), but hard to determine whether they advance moral values or interfere with them. Still, there is no way to avoid addressing them, and reform proposals that neglect them will often seem obtuse and unworkable.

Conclusion

All NLE proposals rest on four assumptions: that unrestricted preferences are sufficiently correlated with the morally proper understanding of well-being; that the proposal will advance, or not damage, distributive justice; that relevant non-welfarist norms are either weak or not damaged by the proposal; and that the behavioral assumptions of economics are approximately correct. These assumptions are, I suspect, rarely met for concrete proposals that generate identifiable winners or losers. But NLE can make progress by respecting the policy-analysis division-of-labor: modular proposals can be generated at the mid-level of abstraction and, in many cases, incorporated into more comprehensive proposals at the concrete level. All of this means that NLE support for specific policies is always contingent and dependent on moral and practical claims outside economics and welfarism.

33. See, e.g., ELLICKSON, *supra* note 17; RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2014); POSNER, *supra* note 17.

The Boundaries of Normative Law and Economics

The welfarist assumptions of normative economics are, like the assumptions of descriptive economics, simplifications that enable the policy analyst to gain tractability at the expense of realism.³⁴ If our normative standards are complex, then every judgment becomes an all-things-considered exercise, one involving introspection, debate, and consensus-building. Normative economics has made progress not by proving that our normative standards are simple but by developing ways to break up (some) moral or policy judgments into simpler parts and more complex parts, allowing economic analysis to inform (only) the former.

34. See Zoë Hitzig & E. Glen Weyl, *A Crossroads, Not an Island: A Response to Hanoch Dagan*, 117 MICH. L. REV. ONLINE 117 (2019).