WHY KAPLOW AND SHAVELL’S “DOUBLE-DISTORTION ARGUMENT” ARTICLES ARE WRONG

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INTRODUCTION

Louis Kaplow and Steven Shavell\(^1\) (hereinafter KS) are worried. They are concerned that legal academics are recommending and legal decision makers (legislators, judges, juries) are making or may make adjustments in “legal rules”\(^2\) in order to redistribute income from the richer to the poorer that are unnecessarily distorting,\(^3\) unnecessarily economically inefficient,\(^4\)

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\(^1\) Kaplow and Shavell are professors of Law at the Harvard Law School. Both hold Ph.D.s in economics. Kaplow also has a J.D.

\(^2\) I am using the expression “legal rules” because KS do so. In fact, KS’ use of the expression “legal rules” is somewhat misleading. “Rules” are decision-standards that dictate results. A system that has inconsistent rules is in crisis. Although our legal system does contain some rules, the common law and most legislation make the legality of the conduct they cover depend not on legal rules but on various “decision-considerations” whose content and weight must be inferred from the relevant common-law doctrine’s or legislation’s text, history, purposes, etc. Indeed, even when the law can be said to promulgate a rule, the application of that rule will almost always involve the interpretation of concepts it employs that cannot be properly understood in the relevant context without reference to a variety of sometimes-conflicting considerations. Decision-considerations—e.g., moral principles—have a dimension of weight. The fact that a legal system contains decision-considerations that favor different outcomes in a given case does not put it into crisis. When the relevant considerations conflict, the internally-right answer to the legal-rights or damages question in dispute is the answer favored by the consideration or set of considerations that is weightier in the case at hand. KS should therefore have used an expression like “legal decision-considerations” rather than the expression “legal rules.”

\(^3\) In both standard economics terminology and the Double-Distortion-Argument, the statement that the private benefits, private costs, or private profitability of a choice is “distorted” indicates that the relevant private figure differs from its allocative counterpart (i.e., what is often somewhat-misleadingly called its “social” [economic-efficiency-relevant] counterpart). Thus, other things being equal, the (private) marginal cost of a polluter’s last unit of output will be distorted if it does not equal his marginal allocative cost because it does not reflect the pollution costs its production imposes on others. I use the adjectives “inflated” and “deflated” to refer respectively to situations in which the relevant private figure is higher or lower than its private counterpart. In the above pollution example, I would therefore say that the polluting producer’s (private) marginal costs were “deflated.”

\(^4\) Economists distinguish three senses of “economic efficiency”—a Pareto-superior sense, a potentially-Pareto-superior sense, and a monetized sense. In this Essay, I will use the expression in its monetized sense—viz., a choice will be said to be economically inefficient if the equivalent-dollar losses it imposes on its victims exceed the equivalent-dollar gains it confers on its beneficiaries. Roughly speaking, the equivalent-dollar losses a choice imposes on its victims equal the number of dollars they would have to lose through a process they did not value or disvalue in itself and that did not affect them indirectly by conferring benefits or imposing costs on others to be left as poorly off as the choice would leave them. The equivalent-dollar gains a choice confers on its beneficiaries equal the number of dollars they would have to receive through a sequence of events that they neither valued nor disvalued intrinsically and that did not affect them indirectly by impacting others to be left as well off as the choice would leave them. For an explanation of these operationalizations, see Richard S. Markovits, *A Constructive Critique of the Traditional Definition and Use of the Concept “The Effect of a Choice on Allocative (Economic) Efficiency”: What Is Right and Why the Kaldor-Hicks Test, the Coase Theorem,*
and therefore morally undesirable.\(^5\) The following legal-rule adjustments exemplify the type of decisions that KS would condemn on this basis:

(1) decisions to sacrifice economic efficiency by shifting from negligence to strict liability\(^6\) that are motivated by a combination of their makers’ conclusion that redistributions from the richer to the poorer are morally desirable and belief that the additional injurers who will be found liable under strict liability are sufficiently richer than the additional victims who will be deemed legally entitled to compensation under strict liability for the shift to redistribute income from the richer to the poorer;

(2) jury decisions to award legally-entitled tort victims damages in excess of their actual losses that are made despite the fact that they sacrifice economic efficiency by generating injurer overavoidance and victim underavoidance from the perspective of economic efficiency because jurors place a positive value on redistributions from the richer to the poorer and believe that (tort-case dispositions aside) the relevant defendants are sufficiently richer than the relevant plaintiffs for such supra-compensatory damage-awards to redistribute income from the richer to the poorer; and

(3) scholarly recommendations and judicial decisions that classify educational and public-library uses of copyrighted material as “fair uses,” for which no payment must be made and no license must be secured, that are motivated by a belief that, even if such decisions are rendered economically inefficient by their tendency to deter the creation of copyrighted material, they will be rendered morally desirable by their tendency to redistribute resources in a morally-desirable direction from copyright holders, who are richer, to students and public-library cardholders, who are poorer.

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\(^5\) In fact, as KS consistently point out, their objection would also apply to similar attempts to redistribute income from the poorer to the richer or, most generally, to redistribute resources between or among “richness classes.” To save space, I will ignore this aspect of their position in the text that follows.

\(^6\) In fact, my own view is that in the vast majority of situations strict liability (actually, a combination of strict liability and contributory negligence) is more economically efficient than the combination of negligence and contributory negligence. See Richard S. Markovits, *The Allocative Efficiency of Shifting From a “Negligence” System to a “Strict Liability” Regime in Our Highly-Pareto-Imperfect Economy*: A Partial and Preliminary Third-Best-Allocative-Efficiency Analysis, 73 CHI.-KENT L. REV. 11 (1998).
I hasten to point out that KS’ opposition to such legal-rule choices, damage awards, and doctrine-applications derivestheir rejec-
tion of the distributional norms that they believe these choices are attempting to instantiate nor from their rejection of these decisions’ advocates’ moral conclusions about the way in which the choices in question would redistribute income in comparison with their contemplated alternatives (negligence, compensatory damages, copyright protection). Indeed, at least in the articles that criticize these sorts of decisions, KS take a completely agnostic position on both the distributional-value conclusion and the distributional-impact conclusion that they think these decisions’ supporters have reached. Instead, KS base their conclusion that it is morally undesirable for any type of decision maker to redistribute income from the richer to the poorer by making the non-tax legal liability of a defendant depend on his richness relative to the plaintiff’s on the premise that the relevant redistribution can be effectuated both more economically efficiently and more morally desirably through tax policy. According to KS, this premise has been established by an argument that economists call the Double-Distortion Argument.

Although (as Part II of this Essay demonstrates) the relevant argument should really be denominated the Extra-Distortion Argument rather than the Double-Distortion Argument, the argument in question does justify the economic-efficiency conclusion on which Kaplow and Shavell rely. The Extra-Distortion Argument begins by establishing that, in an otherwise-Pareto-perfect world, the tax policies that would have to be adopted to

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7 I should point out as well that KS’ argument and conclusion would also apply mutatis mutandis to attempts to redistribute resources from the richer to the poorer by making the price a buyer must pay for a good or service the government sells vary directly with his richness or by making the compensation that an individual who has been harmed by government can recover from the government vary directly with his richness.


9 The expression “in an otherwise-Pareto-perfect world” refers to a world in which no Pareto imperfections are present other than the imperfection on which one is focusing. “Pareto imperfections” are departures from the “Pareto-optimal conditions.” Those conditions are the conditions under which
redistribute income from the richer to the poorer would distort the private profitability of one fewer type of decision than would the legal-rule adjustments one would have to make to effectuate the same type of redistribution to the same extent. This intermediate conclusion reflects the fact that the relevant legal-rule adjustments will have the same distorting effect as the tax policy on the private profitability of choices that increase the chooser’s taxable “richness” by any given amount and will in addition distort the private profitability of the choices (say, the accident-or-pollution-loss-avoidance decisions) to which the relevant non-tax legal rules directly relate. The Extra-Distortion Argument then proceeds to demonstrate that the preceding result implies that, transaction-cost considerations aside, in an otherwise-Pareto-perfect world, it will always be possible to redistribute income from the richer to the poorer more economically efficiently through tax policy than through legal-rule adjustments that would make the existence or extent of a defendant’s non-tax liability a function of his income relative to the plaintiff’s income when the adjusted rule would distort the private profitability of the choices to which it directly relates.\(^{10}\)

This Essay explicates and assesses KS’ Double-Distortion-Argument articles. These articles make two claims or sets of claims. The first is that the Double-Distortion Argument warrants the following highly-qualified conclusion:

(1) if one is trying to redistribute resources from the richer to the poorer or between or among classes that are defined by their members’ “richness” (“poorness”)—put more negatively, one is trying to effectuate a redistribution that is not favored because it instantiates what KS refer to as “an entitlement to payment based on desert”\(^{11}\) and that I will hereinafter refer to as a “KS desert entitlement” that is based on a “KS desert norm”;

(2) if one has the option of doing so to the extent desired through tax policy;\(^{12}\)

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10 This final qualification reflects the fact that in some circumstances it will not be distorting to make, say, a victim’s recovery depend on his wealth. For example, since the equivalent-dollar loss a victim sustains when he suffers a given amount of pain will increase with his wealth (given the diminishing marginal utility or value of money), a legal rule that makes compensation for such pain vary with wealth will not be distorting.

11 See KS 1994 at 667 n.2.

12 See KS 2000 at 834 n.30.
(3) if transaction-cost considerations can be ignored or do not favor the conclusion that the legal-rule adjustments needed to effectuate the desired redistribution will be more economically efficient than the tax policies needed to do so; and

(4) if other Pareto imperfections do not make the relevant legal-rule adjustments economically efficient (for example, do not render it economically efficient to make the existence of a defendant’s liability or the amount for which a defendant is liable a function of his richness relative to the plaintiff’s richness when doing so does create an additional distortion); then

(5) not only will it always be more economically efficient but also more morally desirable\textsuperscript{13} for any public decision maker\textsuperscript{14} to reject choices that would redistribute income from the richer to the poorer by making liability and damages decisions depend on the defendant’s richness relative to the plaintiff’s in ways that would generate an extra distortion.\textsuperscript{15}

KS’ second claim is that the various qualifications that their first claim contains can all be ignored. KS attempt to justify this conclusion by asserting or arguing that all these qualifications are empirically insignificant.

As I have already indicated, I have no objection to the Double-Distortion Argument itself or at least to an Extra-Distortion-Argument variant of the Double-Distortion Argument that KS should be willing to en-

\textsuperscript{13} KS usually use the word “should” when expressing their prescriptive-moral conclusions. I will follow their practice when describing their position. As Part I.C of this Essay will argue, in my view, our society engages in two types of prescriptive-moral discourse, which I denominate “moral-ought discourse” and “moral-rights discourse.” KS’ use of the word “should” manifests (1) their failure to recognize this distinction, (2) their belief that it is incoherent, and/or (3) their conclusion that our society does not draw a strong distinction between these two types of discourse.

\textsuperscript{14} As Part VI of this Essay will argue, KS do not distinguish the position of “legislators” and “adjudicators.” I do. More particularly, in the text that follows, I use the term “legislator” to include all those authorized to make law that did not pre-exist their decision. This category includes not only conventional legislators but also administrative rulemakers who have been given strong legislative discretion. (Many legal experts would say that judges acting in an adjudicative capacity are also authorized to exercise legislative power—have strong discretion—in at least some cases. Although I agree that, at least in many jurisdictions, American judges have strong discretion in a few special instances [e.g., when making criminal-sentencing decisions], I do not think that American judges are authorized to exercise legislative power when determining parties’ civil or criminal liability—i.e., I think that there are internally-right answers to all such legal-rights questions and that American judges are obligated to make their best efforts to find them.) Relatedly, in the text that follows, I use the term “adjudicator” to refer not only to judges but to all those authorized to find the law in individual cases. This broader category also includes administrative hearing-officers and, arguably, jurors when they concretize vague standards such as “negligence” or “good faith.”

\textsuperscript{15} I am sure that KS would readily agree that their conclusion would also cover decisions to make the price a buyer must pay the government for a service he purchased from it a function of his richness or the damages that a “victim” of government decision-making could collect from the government a function of his income. See supra note 7 and infra Part VIII.
dorse and rely on. However, I do think that both of KS’ claims are wrong: (1) even the highly-qualified moral conclusion that KS initially claim can be derived from the Double-Distortion Argument is not warranted by that argument’s economic-efficiency conclusion; and (2) the arguments that KS contend justify ignoring the qualifications in their initial statement of their economic-efficiency and moral conclusions cannot bear scrutiny and those qualifications cannot in fact be ignored.

I will now outline my objections to KS’ two claims. KS’ first claim is wrong because, even if the conditions it specifies are fulfilled, its moral conclusion would not follow from its economic-efficiency conclusion. This objection is justified for two reasons. First, KS’ moral conclusion incorrectly assumes that—as a prescriptive-moral matter—the fact that a legal-rule adjustment would be a less-economically-efficient way to redistribute resources from the richer to the poorer than the tax policy implies that it would be a less-morally-desirable way to do so. That assumption is simply incorrect. Indeed, as Part III.C points out, even if the relevant tax policies could (contrary to fact) be shown to be Pareto superior to the relevant legal-rule adjustments, that demonstration would not guarantee the tax policy’s greater moral desirability from all legitimate value-perspectives. Second, the moral conclusion that KS’ first claim asserts is also wrong because it ignores the difference between the prescriptive-moral positions of adjudicators and legislators.

The following two examples should concretize this second problem. Suppose a legislature passed an unnecessarily-economically-inefficient and morally-undesirable tort statute that explicitly makes the existence or extent of a defendant’s liability depend on his richness relative to the plaintiff’s richness, or it replaces a negligence system with a less-economically-efficient strict-liability regime in order to redistribute income from the richer to the poorer. Alternatively, suppose that in order to redistribute income from the richer to the poorer, high-court judges in the relevant jurisdiction have consistently applied strict liability in the type of case to be decided despite the fact that these decisions were both more economically inefficient and less morally desirable than a tax policy that could have effectuated an equally-desirable redistribution from the relevant value-perspective. KS apparently believe that a judge in the case to which the relevant statute or precedents relate should refuse to apply the statute or precedents in question if this decision would induce the legislature to pass new tax legislation that would effectuate the relevant distributional value to the same extent. KS would argue that this conclusion is correct because the Double-Distortion Argument demonstrates that the tax policy would be a more economically efficient and morally desirable way to secure the desired redistribution than the legal rule the statute or precedents promulgated.
KS’ second claim—that the various qualifications that their first claim contains are empirically unimportant and therefore can be ignored in practice—is also incorrect. None of KS’ arguments in support of their dismissals of these desert-norm, political-availability, transaction-cost, and otherwise-Pareto-perfect-economy qualifications to their primary claim can bear scrutiny, and all of these qualifications are empirically important.

The first qualification that KS’ first claim contains is a “desert-norm” qualification—an admission that the Double-Distortion Argument has no implications for the moral desirability of making economically-inefficient adjustments in (non-tax) legal rules to secure “KS desert entitlements” (to effectuate the evaluative standards that I am calling “KS desert norms”)\(^1\)

\[\text{i.e., norms that do not focus exclusively on the shape of the income/wealth or utility distribution and/or on total income/wealth or utility but focus instead or as well on whether the amount of resources and opportunities that different individuals receive vary appropriately with their conduct, histories, attributes, and/or needs. KS implicitly denigrate this qualification by asserting that the Double-Distortion Argument establishes the moral undesirability of adopting intrinsically-economically-inefficient legal rules to resolve tort-law or contract-law disputes,}\]

\[\text{which many scholars believe we are committed to resolving in accordance with our corrective-justice-related “desert norm” commitments.}\]

KS make no argument in their Double-Distortion Argument articles to justify this denigration of their initial restriction of their basic moral conclusion to attempt to instantiate non-desert-oriented distributional norms. However, another of KS’ articles that analyzes and evaluates what they call “fairness” versus “welfare” norms\(^2\)

\[\text{\footnotesize See KS 1994 at 667 n.2. In philosophical discussion, the type of distributional norm to whose effectuation the Double-Distortion-Argument relates is sometimes referred to as “end-result” norms. Such norms focus exclusively on the shape of the distribution of resources. In philosophical discussions, the type of distributional norm to which KS’ category “desert norm” belongs is sometimes referred to as “historic norms.” Such norms do not focus essentially on the shape of the distribution of resources. They focus instead on whether individuals receive what they deserve. The expression “historic norms” is somewhat misleading because, although some such norms focus on the conduct (histories) of the relevant individuals, others focus on their attributes, needs, and/or beliefs. See infra Part I.B and Part V.}\]

\[\text{\footnotesize See KS 1994 at 669-74 for their discussion of torts cases and see id. at 674 for their discussion of contracts law.}\]

\[\text{\footnotesize Most of the relevant scholars are Dworkinians. See, e.g., in addition to my presentation of this position in Part V.C, David A.J. Richards, Constitutional Legitimacy, The Principle of Free Speech, and the Politics of Identity, 74 Chi.-Kent L. Rev. 779 (1999) and Ronald Dworkin, Taking Rights Seriously (1977).}\]

\[\text{\footnotesize Louis Kaplow and Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 961 (2001) [hereinafter KS 2001]. I have enquired “fairness” because Kaplow and Shavell’s definition of “fairness norms”—viz., norms that do not make the moral desirability of a choice depend exclusively on its impact on total utility and/or the shape of the distribution of utility—does not correspond to ordinary usage. Thus, for example, in ordinary usage, a norm that states that each person should have the same}\]
makes explicit claims that probably underlie their supposition that the Double-Distortion Argument establishes the moral undesirability of the kinds of economically-inefficient tort-law and contract-law adjustments to which they object. That assumption is that norms that do not focus exclusively on total utility and/or the distribution of utility (which KS terms “fairness norms” in the article in question) cannot bear moral scrutiny. In KS’ judgment, such fairness norms have in practice been ill-specified, may well be incoherent, and are certainly morally indefensible. Parts I.C, V.A, V.B, and V.C, counter these contentions, and Parts IV and V counter both these contentions and various other arguments that might be made to support the conclusion that KS’ desert-norm qualification is not empirically important.

KS offer two reasons why one can ignore their admission that their moral conclusion holds only if the allegedly-morally-superior tax law is politically available. The first is that any attempt by a judge to redistribute income from the richer to the poorer in the face of the legislature’s failure to do so to the allegedly-desired extent will be reversed by the legislature—i.e., that any such judicial efforts will amount to a costly spinning of wheels. The second is that any such attempt would be improper for judges to make in a democracy. This Essay explains why the first, political argument is likely to be empirically wrong in a wide variety of situations. The Essay also points out that, although the second, normative argument is probably correct in virtually all relevant cases, not only have KS failed to explain why it is correct but their position on the incoherence and/or indefensibility of what they term “fairness values” probably precludes them from developing any such explanation.

KS also denigrate the transaction-cost qualification to their moral conclusion. In particular, KS assert that transaction-cost considerations undoubtedly favor the conclusion that it will always be more economically efficient to redistribute (any significant amount of) income20 from the richer to the poorer through tax law than through legal-rule adjustments. Although I suspect that KS’ conclusion on this issue is probably correct in relation to the contemporary United States, they seem to be unaware of the reasons for believing that this claim might not be true at other times and/or in other countries. Another part of KS’ treatment of the transaction-cost issue is also

amount of utility would be classified as a “fairness norm.” I have enquoted the word “welfare” because KS’ use of this term also does not correspond to the way in which it is normally used by either economists or others. Thus, the standard economic usage equates “welfare” with “total utility”—i.e., does not make a society’s total welfare a function of the distribution of utility among its members. Moreover, I think that non-economists often do not equate “welfare” with “utility.” Thus, some liberals might say, for example, that an individual’s welfare is a function of the extent to which he leads a life of moral integrity, even if the utility he experiences is not monotonically related to the extent to which he leads such a life.

20 See KS 2000 at 834 n.30 and at 833-34 more generally.
deficient. In particular, their negative response to a critic (Chris Sanchirico\(^2\)) who argued that tort-law adjustments might be less-transaction-

\(^2\) See Chris William Sanchirico, Deconstructing the New Efficiency Rationale [hereinafter Sanchirico 2001], 86 CORNELL L. REV. 1003 (2001) and Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View, 29 J. LEGAL STUD. 797 (2000) [hereinafter Sanchirico 2000]. Sanchirico’s critique of Kaplow and Shavell is complementary to mine in two senses. First, unlike my critique, Sanchirico’s attacks KS on their own norm-related assumptions. In particular, Sanchirico accepts three of KS’ norm-related assumptions that I reject—viz., (1) that the distributional norm to be effectuated will always be one that focuses on total utility or well-being and/or on the distribution of utility or well-being (indeed, Sanchirico always assumes and KS usually assume that the applicable distributional norm focuses on the maximization of utility or well-being. See Sanchirico 2001 at 1032); relatedly (2) that the prescriptive-moral position of “adjudicators” is no different from that of “legislators” (at least, Sanchirico never adverts to the contrary possibility); and (3) that policies that maximize economic efficiency will maximize total utility. See id. at 1014, (equating the statement that a rule yields “a reduction in total well-being” with the statement that “it is [economically] inefficient”). I should say that Sanchirico’s adoption of this third assumption is surprising, given his recognition of the difference between equalizing income and equalizing well-being. See id. at 1032. Second, Sanchirico emphasizes deficiencies of KS’ economic arguments on which I do not focus. More specifically, Sanchirico demonstrates that KS’ formal, non-Double-Distortion-Argument argument for their conclusion that (allocative administrative costs aside) the most-economically-efficient way to effectuate the kind of distributional norm KS assume to be in play is to do so exclusively through income taxes holds only if one accepts various unrealistic assumptions that they make, see id. at 1039-41 and 1056-69, and that the contrary conclusion is well-established in the optimal-taxation literature. See id. at 1021-31. Sanchirico’s public-finance expertise makes him better-placed to make these points than I. However, even if his demonstration of these points did not reduce the need for me to make the same arguments, my need to do so would be reduced by my demonstration that the three norm-related KS assumptions that Sanchirico also adopts are incorrect. In a world in which the norms to be effectuated do not focus exclusively on the maximization or distribution of utility or well-being and a fortiori in a world in which (partially relatedly) the prescriptive-moral position of “adjudicators” is different from that of legislators, KS’ conclusion can be shown to be false without resort to those of Sanchirico’s arguments to which I have just referred. I want to make one final point. In Sanchirico 2001, Sanchirico claims that KS’ first primary conclusion does not actually follow from the Double-Distortion Argument not only because some applicable distributional norms cannot be effectuated by taxes on “income” (I take that to be the point of his statement that “the Double-Distortion-Argument . . . simply has no bearing on redistribu-
tional adjustments to legal rules that are not specifically structured to depend on the incomes of the parties to the action.” See id. at 1069) but also because in an otherwise-Pareto-imperfect world the argument’s demonstration that decisions that make an individual’s legal liability or entitlement depend on his income will generate one more distortion than taxes on his income does not prove that the legal-rule adjustment in question is a less-economically-efficient method of securing the desired redistribution in question than those additional taxes would be (I take that to be the point of his statement that the “Double-Distortion-Argument . . . is flawed . . . [by] its implicit reliance on ‘distortion-counting’ ” Id.). As I have already indicated in the Introduction and will analyze in more detail in Part VIII, although KS do anticipate and protect themselves against his criticism (they do explicitly acknowledge that one cannot predict whether there will be more economic inefficiency in one situation than in another by comparing the number of distortions operative in each and explicitly state the reason for this conclusion, see KS 2000 at 824 n.5 (“one distortion may offset another”), and they do qualify their initial statement of their economic-efficiency and moral conclusions by indicating that they relate to the relative eco-
nomic inefficiency of economically-inefficient legal-rule adjustments that make legal-liability or dam-
costly than tax policy (1) underestimates how transaction-costly the kind of
tax policy that would be required to effectuate redistributions from the
richer to the poorer would be (in part because they adopt an impoverished
metric for “richness”), (2) assigns their opponent the relevant burden of
proof (without giving any reason for doing so), (3) assumes incorrectly that
the alleged impracticability of establishing correlations between the inci-
dence of various Pareto imperfections bears on the practicability of estab-
lishing the kind of social correlations (say, between richness and klutziness)
on which Sanchirico wants to rely, and (4) assumes without any basis and
in the face of much evidence to the contrary that the failure of economists
to explore various Pareto-imperfection correlations reflects their consid-
ered, expert assessment of the cost-effectiveness of doing so.

Finally, although KS initially admit that in theory the extra distortion
that distributionally-motivated legal-rule adjustments will generate could
increase rather than decrease economic efficiency by counteracting the net
distorting impact of the other Pareto imperfections present in the system,
they almost immediately assert that this outcome will not occur in the real
world. This Essay contradicts this assertion by explaining why various er-
rors that individuals may make may render legal-rule adjustments that
would otherwise be less economically efficient than equivalently-
redistributive tax policies more economically efficient than those tax poli-
cies and why various imperfections in our political-economy arrangements
may render economically efficient extra-distortion-generating decisions to
make the legal entitlement of someone who has been harmed by a govern-
ment decision depend (roughly speaking) on whether he is poorer or richer
than average.

In short, this Essay (1) explains why KS should have substituted an
Extra-Distortion Argument for the Double-Distortion Argument on which
they relied, (2) explains why the highly-qualified moral conclusion they
claim to derive from the Double-Distortion Argument cannot be derived
from the economic-efficiency conclusion of that argument and will at least
sometimes be incorrect, (3) explains why KS’ arguments for denigrating
the four qualifications they initially make to their moral conclusion are in-
correct, and (4) explains why each of those qualifications is almost cer-
tainly far more important than KS claim or implicitly assume.

The length and complexity of this Essay make it unlikely that anyone
will read it in one sitting. Moreover, several of its arguments are suffi-

ages conclusions depend on the parties’ relative “incomes.” See KS 1994 at 675-76 and 680-81; KS
2000 at 823 [last two lines] and 825-27), Sanchirico’s Second-Best objection to KS’ argument is still
well-taken, given KS’ claim that in practice the Second-Best-Theory-related qualification they initially
make to their economic-efficiency and prescriptive-moral conclusions can be ignored. See KS 2000 at
824 n.5.
ciently interconnected for it to be helpful for persons who do not read it in one go to be reminded of the content of the sections they have read before proceeding to new material. For this reason, the Introduction will conclude with a part-by-part summary of the Essay’s content.

The Essay’s analysis is presented in nine parts. Part I points out and explores five ambiguities in, alleged ambiguities in, or peculiarities of KS’ position. Three of the actual ambiguities or peculiarities relate to KS’ treatment of or failure to consider prescriptive-moral norms that their arguments and conclusions either do or may implicate. Part I’s investigations of the moral-norm-related features of KS’ position includes discussions of (1) the distinction between moral-rights discourse and moral-ought discourse, (2) the related distinction between rights-based societies and goal-based societies, (3) the distinctions among the non-distributive-justice, primary rights whose violation gives rise to secondary, corrective-justice entitlements, corrective-justice rights, and distributive-justice rights, and (4) the substantive content of both the liberal norm to which I think our rights-based society is committed (a liberal norm that underlies and grounds the concretization of each of the three types of rights just distinguished in any liberal, rights-based society) and various other moral norms on which members of liberal, rights-based societies can legitimately base conduct-choices that have a moral dimension but are not required or precluded by anyone’s rights. These discussions provide a basis for Part IV’s critique of the arguments or assertions that KS made in their so-called “fairness” versus “welfare” scholarship that would support their implicit assumption that the “desert entitlement”/“desert norm” qualification to the conclusion of their Double-Distortion-Argument argument was empirically unimportant—viz., that the decision-standards that they classify as “fairness norms” (all of which are “desert norms” in the sense in which their use of the expression “entitlement to payment based on desert” in their Double-Distortion-Argument articles implies they would define this concept) may be incoherent and certainly are indefensible.

Part II then explicates the Double-Distortion Argument, which KS use to justify their first claim, and explains why KS should really have used an Extra-Distortion-Argument analog to the Double-Distortion Argument to establish that at least in some circumstances it will be more economically efficient to effectuate particular redistributions (to effectuate certain types of distributional norms) through tax policy than by making economically-inefficient adjustments in legal rules.

Next, Part III.A examines an ambiguity in the concept “more economically efficient.” Part III.B argues that at some junctures KS mistakenly claim that the Double-Distortion Argument establishes the economic-efficiency superiority of tax policies over “distributionally-equivalent,” economically-inefficient legal-rule adjustments in the potentially-Pareto-superior sense of “more economically efficient,” and Part III.C argues that
this error is connected to KS’ mistaken assumption that Pareto-superior options will always be morally superior to their Pareto-inferior alternatives and their understandable desire to increase the significance of their conclusions.

Parts IV and V are designed to establish two propositions. First, KS’ claim that the Double-Distortion Argument implies that it would be undesirable for adjudicators in common-law torts or contracts cases to adjust the applicable legal rules in a way that sacrifices economic efficiency to instantiate some distributional norm is inconsistent with KS’ admission that the Double-Distortion Argument has no bearing on the moral desirability of sacrificing economic efficiency to instantiate “an entitlement to payment based on desert.” And second, KS’ desert-norm qualification is in reality very important. KS’ implicit assumption that the desert-norm qualification, which they acknowledge, does not preclude them from claiming that the Double-Distortion Argument implies the undesirability of adjudicators’ sacrificing economic efficiency to resolve common-law torts and contracts cases would be correct if and only if one or more of the following positions were justified:

1. the societies whose adjudicatory decisions they are analyzing are not committed to desert norms that relate to the resolution of the issues with which the common law of torts and contracts are concerned;
2. even if such societies are committed to such desert norms and do establish common-law courts to resolve tort and contracts disputes, common-law adjudicators in such societies are not obligated to and/or morally-ought not base their common-law torts and contracts decisions on such relevant desert norms;
3. KS’ desert-norm qualification is limited to coherent, defensible desert norms and no desert norm that could be relevant to the resolution of any tort or contract common-law dispute could be coherent and defensible; and/or
4. the instantiation of any coherent, defensible desert norm that could be relevant to the disposition of such a suit would not require the sacrifice of economic efficiency.

Between them, Parts IV and V demonstrate or explain why all four of these positions are wrong. In so doing, they

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23 See id. at 674.
24 See id. at 667 n.2.
(1) demonstrate that the Double-Distortion Argument does not establish the undesirability of adjudicators’ both in our society and in various other types of societies making common-law tort and contract decisions that sacrifice economic efficiency to instantiate the distributional norms to which the societies in question are committed;

(2) demonstrate the moral desirability of adjudicators’ in such societies making such tort and contract decisions; and

(3) demonstrate the desirability of adjudicators’ making a wide variety of various other kinds of legal decisions that sacrifice economic efficiency to instantiate various relevant desert norms and of legislators’ doing so as well.

I will now provide a detailed outline of the content of Parts IV and V. Part IV has two subparts. Subpart IV.A explains: (1) why adjudicators and legislators in rights-based societies may be obligated to effectuate one or more desert norms in a wide variety of situations and that adjudicators will be obligated to do so inter alia when addressing common-law tort and contracts cases even when they are obligated to sacrifice economic efficiency to instantiate the applicable desert norms; and (2) why it will sometimes be morally permissible (i.e., consistent with the relevant society’s moral-rights commitments) for legislators in rights-based societies to base legislation on moral-ought distributional desert norms even when doing so is economically inefficient—in particular, why the effectuation of such desert norms will often not violate the relevant society’s moral-rights commitments. Subpart IV.B then summarizes and criticizes the various assertions and arguments that KS make in their “fairness” versus “welfare” scholarship that state or imply that all norms that they denominate “fairness norms” in that scholarship—a category that includes all norms that belong in what I am denominating their Double-Distortion-Argument articles’ “KS desert norm” category—may well be incoherent and are certainly indefensible.

Part V exemplifies the importance of KS’ “desert norm” qualification by examining three desert norms that are coherent and defensible and whose instantiation (which would be either obligatory or morally permissible in our liberal, rights-based society) would at least sometimes require economic efficiency to be sacrificed: (1) the distributive-justice corollary of our society’s liberal commitments to treating each creature for which it is responsible that has the neurological prerequisites for leading a life of moral integrity with appropriate, equal respect and concern; (2) a variant of the libertarian distributional norm that might be defensible and (if it is defensible) could legitimately be used in our society to generate moral-ought conclusions; and (3) the primary rights whose violation triggers secondary, corrective-justice rights that are corollaries of the liberal norm that I think our society is committed to instantiating in its moral-rights discourse and decisions. More particularly, Part V’s respective subparts delineate the
relevant concrete corollaries of the liberal and libertarian norms in question and explain why in some cases they cannot be effectuated without sacrificing economic efficiency.

Next, Part VI argues that, even if KS were correct that “legislators” should never sacrifice economic efficiency by altering legal rules to make a defendant’s liability or damages-obligations an explicit function of his income or income/wealth position relative to that of the plaintiff if political realities and transaction costs could be ignored, that conclusion would not apply to “adjudicators” in many situations. Part VI focuses in particular on the obligations of judges to enforce constitutional but “undesirable” legislation passed by legislators who had not followed KS’ recommendations and to follow some precedents that were legally wrong when originally established in addition to being undesirable from an external-to-law perspective.

Part VII speculates on and criticizes the possible basis of KS’ failure to comment on the relevance of the distributional imperfectness of a society’s actual tax legislation (from the society’s or its decision makers’ perspectives) for the way in which its “legislators” should resolve the non-tax issues they must decide. It criticizes KS’ empirical political argument, points out the inchoate character of the jurisprudential argument that KS allege justifies their conclusion that their political assumptions should not affect the way in which courts make their legal-rule decisions, and delineates some other KS conclusions that would be undermined by the jurisprudential position in question.25

Part VIII examines KS’ treatment of the possibility that it may be economically efficient to make decisions about someone’s liability (entitlement) or the damages someone who is liable must pay (the compensation to which someone is entitled) depend on his income/wealth position. It begins by admitting that KS do recognize two of the reasons why such an approach may be economically efficient—a non-causal, correlational (i.e., correlation-based) reason and a conventional second-best reason. It then makes three criticisms of KS’ treatment of this issue. First, it demonstrates that KS ignore a “causal” reason why such an approach may be economically efficient in a significant set of cases. Second, it points out that KS do not seem to recognize that one of the examples they use to illustrate the possible economic efficiency of making tort-law liability-decisions depend on the injurer’s and victim’s earned incomes in some cases illustrates the non-causal, correlational (administrative-cost) reason rather than the causal reason for adopting such an approach. Third, it argues against KS’ assertion that the second-best reason has no practical significance by outlining two counterexamples.

25 See KS 1994 at 675 and KS 2000 at 834 n.30
The first reveals that the human-error imperfection associated with the
tendency of some accident-event or pollution-event participants to underes-
timate the amount by which their avoidance would reduce the accident or
pollution losses they will impose on others and/or suffer themselves may
counteract the additional distortion that would be generated by the substitu-
tion of a redistributive accident-or-environmental-law rule for a “distribu-
tionally-equivalent” tax rule—i.e., reveals that in an economy in which the
relevant human errors are made the extra-distortion-generating accident-or-
environmental-law rule may be more economically efficient than the dis-
tributionally-equally-attractive tax provision. The second reveals that
Pareto imperfections in our political economy that, roughly speaking, cause
our governments to make economically-inefficient decisions that benefit
the rich at the poor’s expense may render extra-distortion-generating compen-
sation rules that favor the poor (say, in takings cases) more economi-
cally efficient than tax provisions that would redistribute resources from the
richer to the poorer to an equivalent extent because at least some of the
extra distortions that such compensation rules would generate will counter-
act some of the distortions caused by the independent Pareto imperfections
in our political economy. Part VIII notes as well the possible connection
between KS’ failure to consider the political-economy-related second-best
argument for making some liability and compensation decisions depend on
a plaintiff’s income/wealth position and their tendency to underestimate the
relevance of the fact that a society’s actual tax law is imperfect for whether
its “legislators” and “adjudicators” should make economically-inefficient
adjustments in legal rules to secure the redistributions that the imperfect tax
law failed to secure.

Finally, Part IX examines KS’ skepticism about whether it will ever be
“third-best overall”—i.e., best overall, given the presence of Pareto and
distributional imperfections that the decision maker cannot eliminate, the
inevitable cost of data and analysis, and the inevitable imperfectness of at
least data—to make a legal-liability or damages/compensation decision
depend on one or both litigants’ earned-income or income/wealth position
for non-causal, correlational (administrative-cost) reasons in any sort of
situation other than the one they cited. Among other matters, Part IX con-
siders whether KS’ doubts on this issue are supported, as they allege,26 by
the fact that public-finance economists who are aware of the implications of
Second-Best Theory have chosen not to do empirical research into the
magnitude of the various Pareto imperfections that they recognize might
afford the economic efficiency of the tax-policy options whose economic
efficiency they are assessing.

26 See id. at 833-34.
I. FIVE AMBIGUITIES IN, ALLEGED AMBIGUITIES IN, OR PECULIARITIES OF KS’ POSITION

A. The Universal Character of KS’ Primary, Qualified Claims

As the Introduction indicates, KS qualify their claim that “normative economic analysis of legal rules should focus on their efficiency” by stating that this conclusion assumes that: (1) the distributional norm to be effectuated is a coherent, defensible norm that does not link an individual’s entitlement to his desert; (2) the tax policy that they argue is superior is politically available; and (3) transaction-cost considerations can be ignored. However, their text contains inconsistent statements about whether—when those conditions are fulfilled—normative economic analysis of legal rules (i.e., non-tax decisions) should always focus exclusively on their “efficiency.” For the most part, KS seem to be arguing for the universal variant of the qualified proposition that I attributed to them. Admittedly, in KS 2000, KS point out that their 1994 article stated that their argument does no more than “suggest” that normative economic analysis of legal rules should be primarily concerned with efficiency rather than the distribution of income” (emphasis added, as it is in the KS 2000 footnote that reminds readers of this text). In fact, however, KS’ explanation for both their use of the word “suggest” and their inclusion of the word “primarily” implies that these choices reflect their recognition that in some instances it may be

27 See supra text accompanying and immediately following notes 11-12.
28 Like virtually all economists, KS use the term “efficiency” to refer to “economic efficiency.” Since, as I will argue in Part III, “increasing economic efficiency” is not a value in itself and “increases in economic efficiency” are less likely to be valued than “increases in efficiency” in the ordinary-language sense of that expression, I find this usage misleading. In my own work, I prefer to substitute the expression “allocative efficiency” for “economic efficiency” to remind readers that the concept in question is a technical concept and that the normative relevance of “increases in allocative efficiency” depends inter alia on the value-perspective from which the relevant evaluation is being made. I should add that—like economists in general—KS also seem to make the related, unjustified assumption that policies that increase economic efficiency can be said to be “socially desirable” on that account. See id. at 826. For a detailed analysis of the prescriptive-moral and legal relevance of economic-efficiency conclusions (including a critique of various arguments that economists and non-economist Law & Economics scholars have made on this issue), see Richard S. Markovits, On the Relevance of Economic-Efficiency Conclusions, 29 FLA. ST. L. REV. 1 (2001). See also infra Part III.
29 See, e.g., the first sentence of the ABSTRACT to KS 2000 at 821: “In our 1994 article in this Journal [KS 1994], we demonstrated that legal rules should not be adjusted to disfavor the rich and favor the poor in order to redistribute income because the income tax and transfer system is a more efficient means of redistribution.”
30 Id. at 827 n.13.
economically efficient to adopt a legal rule that creates an imperfection (generates a distortion) that increases economic efficiency by counteracting the other imperfections (distortions) present in the system—a reality that has no implications for the universal character of their qualified moral claim. Given this and the fact that KS’ argument for their qualified moral conclusion does not imply that it should be limited in any further way, I would conclude that the best reading of KS is that they are making the universal qualified claim I attributed to them.

B. The Ambiguity of KS’ Use of “Should” and “Entitlement” Language—Their Failure to Recognize the Distinction Between “Moral-Ought Discourse” and “Moral-Rights Discourse”

I will begin with some general comments on the various moral types of societies that are worth distinguishing, the moral identity of our own society, and the relevance of these observations for the issue on which this subpart focuses. In my judgment, it is useful to distinguish at least four moral types of societies: (1) rights-based societies of moral integrity; (2) goal-based societies of moral integrity; (3) amoral societies; and (4) immoral societies. The members and governments of “rights-based societies of moral integrity” (A) strongly distinguish moral-rights discourse from moral-ought discourse (see below); (B) are committed to the proposition that moral-rights conclusions trump moral-ought conclusions when they favor different conduct; and (C) fulfill their moral obligations to some hard-to-specify, requisite extent. The members and governments of “goal-based societies of moral integrity” (A) draw no strong distinction between moral-rights discourse and moral-ought discourse—in effect, are concerned only with moral-ought issues; (B) are committed to instantiating a specifiable moral norm or moral-norm combination in their prescriptive-moral conduct; and (C) fulfill that commitment to some hard-to-specify, requisite extent. Neither the members nor the governments of what I call “amoral societies” conform the choices that they make in any requisitely-long time-period to the relevant requisite extent to any decision-criterion that deserves to be called a “moral norm.” And the members and governments of “immoral societies” explain their behavior in terms of and/or make choices that can best be explained by their subscription to one or more evaluative-criteria that are immoral.

I believe that a philosophically-sophisticated anthropological study of the prescriptive-moral discourse and conduct of the members and governments of our society would reveal that it is a rights-based society of mid-

dling but increasing (or at least contemporaneously passable) moral integrity. I also believe that a similar but more detailed study of the extent to which various candidates for our society’s “basic moral principle” title fit the facts they should fit as well as of the extent to which the non-fits of each such candidate are explicable in ways that reduce the damage they do to that candidate’s candidacy would reveal that our rights-based society is committed to deriving its moral-rights conclusions from the liberal moral principle that each moral-rights holder (for whom it is responsible) is entitled to appropriate, equal respect and concern where the concern in question is especially directed at each such individual’s actualizing his or her morally-defining potential to lead a life of moral integrity.

This prologue is important because KS assert that their argument is relevant to the moral desirability of certain types of legal-rule adjustments in our society and, unless one believes in the objective demonstrability of the truth-value of a particular moral norm or moral-norm combination, at

33 The relevant facts are the moral-rights claims that members of our society make and do not make, the arguments they make and do not make in support of and against those moral-rights claims, the conclusions they reach about those moral-rights claims, how close they perceive the relevant “cases” to be, how certain they are about their conclusions about the correct resolution of the relevant moral-rights claims (and moral-rights-related legal-rights claims), and the actual moral-rights-related conduct of the members and governments of the society in question. The word “cases” is enquoted in the preceding sentence because the overwhelming majority of the relevant claims are not made in adjudicatory settings or in any other type of legal forum—i.e., are moral-rights claims made privately rather than in litigation or before administrative agencies, legislatures, or non-administrative executive-branch officials.

34 The various explanations of a non-fit that would reduce the damage it does to a candidate’s candidacy include the greater power of the non-fits’ beneficiaries, the presence of mechanical transaction costs or other types of costs that make it unattractive for parties to pursue justified claims or attractive for parties to pursue unjustified claims, the fact that the relevant individuals did not adequately consider the beliefs they expressed or the conduct in which they engaged, the possibility that the relevant non-fit might reflect an identifiable conceptual intellectual error that the relevant actors might very well have made, and the possibility that the relevant non-fit might reflect a logical or empirical error that the relevant claimants or claim-evaluators might very well have made. For more detailed accounts and discussions of the protocols that should be used to determine (1) whether a society is rights-based, goal-based, amoral, or immoral and (2) the moral norm or moral-norm combination on which a rights-based society is committed to basing its moral-rights discourse and conduct, see RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION [hereinafter MATTERS OF PRINCIPLE] 13-34 (1998).

35 For a member of a rights-based society to lead a life of moral integrity, he must take requisitely seriously both (1) his (societally-imposed) moral obligations and (2) the “dialectical” task of choosing the values to which he wants to individually subscribe and making his other choices conform with his personal value-choice.

36 I do not believe that any specific moral norm or moral-norm combination can be demonstrated to be objectively true (or superior to any alternative). At least, I have not been convinced by any of the various types of so-called Foundationalist arguments that some argue can establish the contrary conclusion: lower-case Foundationalist arguments (which try to derive an objectively-true value from the
least part of any moral assessment of any choice in a given society will have to take account of that society’s moral identity and more specific moral-norm commitments. Thus, if I am correct about the moral identity of our society, in order to demonstrate the moral superiority in our society of the tax policies that KS are advocating over the legal-rule adjustments against which they are arguing, KS will have to show (1) that the relevant tax policies are consistent with or are required by our society’s liberal moral-rights commitments; (2) that the relevant legal-rule adjustments are not required by our society’s moral-rights commitments; and (3) that the relevant tax policy would be more desirable than its economically-inefficient legal-rule-adjustment alternative from the perspective of all non-liberal norms that our society’s members and governments can legitimately choose to implement when making any of the wide range of moral-ought decisions that do not implicate anyone’s moral rights.

Since both the preceding three paragraphs and a significant number of the arguments that will be made in the text that follows rely heavily on my distinction between moral-rights discourse (and the moral norms on which it is based—hereinafter and stipulatively “moral principles”) and moral-ought discourse (and the moral norms on which it is based—hereinafter and stipulatively “personal ultimate values”), it may be useful for me to exemplify these distinctions. Assume that a famous football-player is visiting an injured colleague in a hospital. A doctor recognizes him and, after apologizing for the intrusion, tells him the following story:

“A 14-year-old boy in this ward is in the midst of a disease-crisis. I am optimistic about the boy’s chances of recovery if the boy gets through the night, but I fear that the boy might die tonight. The boy idolizes you. A visit from you might make all the difference.”

The doctor then requests the football-player to visit the boy.

My point is that in rights-based societies such as our own two different prescriptive-moral questions can be posed about this football player’s position:

concept of morality), Kantian arguments (which try to do so from the concept of human freedom), Aristotelian arguments (which try to do so from the concept of human flourishing), or “Natural Law” arguments (which try to do so from a conception of “human nature”). (Obviously, these thumbnail accounts of the different variants of Foundationalist argument are far from adequate. See also Markovits, supra note 28, at 50-51.) On the other hand, like G.E.M. Anscomb and many other philosophers, I also do not think that the concept “moral norm” is completely socially negotiable—i.e., I believe that the concept “moral norm” has certain ineliminable attributes. I therefore base my conclusion about the specific, moral decision-criterion to whose use a given society or given individual is committed on the kind of highly-qualified conventionalist (“empirical”) analysis of the prescriptive-moral discourse and conduct of the society or individual in question that the preceding text outlined and pages 21-34 of MATTERS OF PRINCIPLE discuss at greater length.
(1) Is the football-player morally obligated to visit the boy; and
(2) (morally) ought the football player to visit the boy?

More elaborately, my point is that in rights-based societies these questions are different in that both (1) “the answers” to them turn on different moral norms and hence on the different sets of facts that the different norms in question implicate; and (2) the answers to them may conflict in the sense of favoring different conduct by the football-player.

Thus, in the kind of liberal, rights-based society that I have asserted our society is, the answer to the moral-obligation question is determined by the liberal principle that obligates all members of our society to treat others with appropriate, equal respect and concern—a norm that makes the football-player’s moral obligation in this situation depend on his status relationship to the boy or various other individuals who are connected with the boy, any related promises the football-player may have made, and whether the football-player was a culpable cause-in-fact of the boy’s predicament.37

By way of contrast, in our liberal, rights-based society, “the answer” to the moral-ought question is determined by the “personal ultimate value” to which the individual answering that question has personally chosen to subscribe and the facts that that value implicates. An individual who is personally committed to utilitarian values will address and may answer the moral-ought question just posed differently from someone who is committed to equal-utility egalitarianism, equal-resource egalitarianism, or some variant of libertarianism. It should be clear that in our society all variants of (non-liberal) moral-ought analyses will be different from (liberal) moral-obligation analysis in that both the norms that the two types of analysis employ and (usually) the facts these norms implicate will be different. Moreover, because moral-ought analysis is so different from moral-obligation analysis in our society, an individual who recognizes that the football-player has no moral obligation to visit the boy may still conclude that the football-player morally-ought to do so or, possibly, an individual who concludes that the football-player has the relevant moral obligation may still conclude that the football-player morally-ought not fulfill it (though, in our rights-based society, moral-rights conclusions trump moral-ought conclusions when the two commend different conduct, and individuals who fail to fulfill a moral obligation are legitimately subjected to

37 Status relationships are significant within liberal theory because such relationships tend to promote the kind of intimacy that contributes to individuals’ discovering what they value. Promises are important to liberals because breaking promises without good cause is disrespectful. Culpable causation is important because the liberal duty of respect also implies that wrongdoers have an obligation to take reasonable steps to reduce the harm their wrongdoing inflicts on others.
weighty moral censure on that account even if their decision reflects their sincere moral convictions).

In their Double-Distortion Argument pieces, KS usually employ the prescriptive-moral verb “should,” though on one occasion they do make reference to “entitlement” norms. Although their usage of these terms might be thought to suggest the contrary, on balance there seems little doubt that KS fail to recognize that our society’s prescriptive-moral practice is bifurcated: that we sometimes analyze what someone morally-ought to do from our own personally-selected value-perspective, that we sometimes analyze what someone is morally-obligated to do from the perspective of moral norms that we do not individually choose for ourselves but are obligated to instantiate by our membership in our society, and that these two types of analyses are not only coherent but substantively distinct.

In my judgment, KS’ failure to advert to the bifurcated character of our society’s prescriptive-moral practice as well as their related failure to recognize that, in our (rights-based) society, moral-rights conclusions trump moral-ought conclusions when the two conflict at least partly reflects their belief in the incoherence and/or indefensibility of the liberal norm of appropriate, equal respect and concern on which I think members of our society are committed to grounding their moral-rights discourse and conduct. In any event, KS’ failure to focus on the distinction between moral-rights discourse and moral-ought discourse accounts for (1) their failure to address separately whether our society can reject the legal-rule adjustments of which they disapprove without violating its moral commitments and whether from various value-perspectives it morally-ought to reject these adjustments; (2) their related failure to consider whether their moral conclusion holds when corrective-justice or distributive-justice norms are implicated; and (3) (A) their apparent failure to recognize that “adjudicators” may not legitimately exercise the same kind of strong discretion that “legislators” are authorized to exercise; (B) their failure to recognize the possibility that “adjudicators” may be morally obli-

See, e.g., the last sentence of the first paragraph of KS 1994 at 667 and the first sentence of the ABSTRACT of KS 2000 at 821.

I derive this conclusion from KS 2001 at 1005-19 and the fact that the liberal principle of appropriate, equal respect and concern does not focus exclusively on total utility and/or the shape of the distribution of utility. See Section 4B of this Essay for (1) a complete delineation of KS’ objections to the category of norms to which liberalism belongs (which KS somewhat unconventionally denominate “fairness norms”) and (2) a critique of each of these objections.

For analyses of the concrete moral-rights and moral-rights-related legal-rights implications of the liberal basic moral principle, see MATTERS OF PRINCIPLE at Chapters 3 and 4. See also infra Parts V.A and V.C.
gated to apply legislatively-adopted or Constitutionally-promulgated redistributive “legal rules” that are unnecessarily economically inefficient; and (C) their failure to discuss or note the societal importance of the various kinds of distributive-justice norms that do not focus exclusively on the shape of the relevant income (or income/wealth) distribution. I will return to these issues in Parts IV, V, and VI of this Essay.

C. The Relationship Between the Category “KS Desert Norms” and the Various Types of Coherent, Defensible Prescriptive-Moral Norms That Rights-Based and Goal-Based Societies Employ

As the Introduction and Part I.A indicated, KS admit that their Double-Distortion-Argument argument is irrelevant to the moral desirability of sacrificing economic efficiency to effectuate what I am calling “KS desert norms.” However, at least in their Double-Distortion-Argument articles, they neither elaborate on what they mean by “entitlement to payment based on desert” nor analyze the relationship between the associated category “KS desert norm” and the various other categories of prescriptive-moral norms that members of our society and other contemporary societies employ.

I can imagine at least three different operationalizations of the concept “desert norms” that underlie KS’ concept of “entitlement to payment based on desert.” Some people with whom I have discussed this issue contend that such “KS desert norms” should be equated with what I would call “moral-rights-related norms.” I reject this interpretation for two reasons. The first is linguistic—statements that someone “deserves” to have certain resources or opportunities can be moral-ought-based as well as moral-rights-based (can manifest the speaker’s personal moral convictions rather than his society’s moral-rights commitments or a universally-true principle of justice). The second is contextual: I reject this interpretation because KS’ point about “desert norms”—viz., that the Double-Distortion-Argument argument does not apply to legal-rule adjustments that are designed to instantiate them—depends on their content rather than on whether (in my terms) they are moral-rights-related rather than moral-ought-related.

The second possible operationalization of “KS desert norms” equates such norms with the “fairness norm” category that KS use in their “fairness” versus “welfare” articles. On this account, “KS desert norms” are norms that do not make the evaluation of choices depend exclusively on their impact on total utility and/or the shape of the distribution of utility. Although all norms that I think KS would consider to be “desert norms” do have this characteristic, as we shall see, some do not.

In my judgment, the category “KS desert norms” contains all and only those (coherent and defensible) distributional norms that do not focus ex-
clusively on the total amount of some desideratum or the shape of the distribution of that desideratum but focus instead or as well on whether the amount of the relevant desideratum that different individuals receive varies appropriately with their conduct, histories, attributes, and/or beliefs. Put somewhat differently and slightly misleadingly, on this account “KS desert norms” are norms that are concerned inter alia with who occupies what position in the relevant distribution as opposed to the total distributed and/or the shape of the relevant distribution.

To see why the distinction between “fairness norms” and this third definition of “KS desert norms” is material, note that—on this third definition—equal-resource egalitarianism, liberalism, and the various non-liberal variants of equal-opportunity egalitarianism would not be KS desert norms (in that all these norms oppose different individuals’ receiving different amounts of the desideratum they respectively value) though they all would be “fairness norms” in KS’ sense (in that they value something other than total utility and/or the shape of the distribution of utility).

I do think that this third definition of “KS desert norm” captures what KS had in mind. However, before proceeding on this assumption, I should admit that on this definition “KS desert norms” are not the only kind of norms to which KS’ Double-Distortion-Argument argument does not apply. Thus, although equal-utility egalitarianism would not be a “KS desert

42 I should note that, to my mind, (1) decision-standards (such as certain libertarian “norms”) that assert that the resources and/or opportunities that a given individual “deserves” depend on aspects of his history for which neither he nor anyone else is morally responsible and do not relate to the relevant individual’s entitlement to the “things” that will enable him to actualize his morally-defining potential to lead a life of moral integrity and (2) decision-standards that assert that the resources and opportunities that someone deserves depend on his beliefs are not moral norms. See also notes 115 and 116 infra.

43 Which requires each relevant creature to receive the same amount of resources, measured (presumably) in terms of their (social) economic (allocative) value.

44 Which, I believe, requires each moral-rights holder to be given the specific resources, total amount of resources, and specific opportunities that contribute significantly to his actualizing his morally-defining potential to lead a life of moral integrity.

45 Which require that each relevant creature have the same opportunity to do something (what “thing” varies with the variant in question) other than lead a life of moral integrity.

46 Admittedly, liberalism and the different variants of non-liberal equal-opportunity egalitarianism will in practice often require different individuals to be allocated different amounts of resources. Thus, Helen Keller would have to be allocated far more resources than others without her disabilities would have to be given to enable them to actualize their respective potentials to lead lives of moral integrity.

47 Liberals do not value leading a life of moral integrity because of the “utility” such a life generates for the person who leads it. Equal-resource egalitarians need not value resources because of the utility they can generate for their owners. And equal-opportunity egalitarians may not value the opportunities they want to be equally distributed because having them or taking advantage of them confers utility on those who respectively have the resources and seize the opportunities.

48 Which requires resources and opportunities to be allocated so as to produce a situation in which each relevant creature experiences the same utility.
norm” on this third operationalization, it could also not be perfectly instantiated through the kinds of taxes KS are commending (though one might argue that it would be no more transaction-costly to make everyone’s tax liability depend on his utility, as opposed to his income/wealth position, than to make all accident-loss co-generators’ legal entitlements depend on their relative utilities).

The category “KS desert norm” is salient because they admit that their Double-Distortion-Argument argument does not demonstrate the undesirability of making economically-inefficient adjustments in legal rules to effectuate “KS desert norms.” At least on the assumption that the KS desert norms in question are coherent and defensible (see Part IV.B), the importance of KS’ desert-norm qualification of their first claim will obviously depend on the frequency with which KS desert norms are in play in our moral type of society and in other types of societies of moral integrity. I will therefore now analyze the relationship between the category “KS desert norms” and the various categories of prescriptive-moral norms that our society and various other contemporary societies employ. As we shall see, all liberal, moral-rights-related distributional norms (in particular, all liberal, non-distributive-justice/corrective-justice-relevant norms, all liberal corrective-justice norms, and all liberal distributive-justice norms) and many other distributional norms\(^{49}\) that in a liberal, rights-based society fall into my category moral-ought-related norms or “personal ultimate values” are “KS desert norms.”

I begin by analyzing the relationship between (1) the category “KS desert norms;” and (2) the various categories of moral-rights-related norms that rights-based societies are committed to instantiating. Rights-based societies are committed to securing three types of moral rights and hence to instantiating three types of moral norms. The first such set of moral rights are the non-distributive-justice, corrective-justice-relevant moral rights of the members of a rights-based society. Such moral rights impose moral obligations both on private actors and on the governments of the societies in question—in the case of governments, the moral obligation to do everything consistent with their general obligation to secure the rights-related interests of those for whom they are responsible\(^{50}\) to prevent not only their own agents but anyone else from violating the moral rights in question.

\(^{49}\) The text uses the term “distributional norm” to refer to all norms whose effectuation will affect the distribution of income, wealth, and/or opportunities. In my usage, then, “distributive-justice norms” are just one type of “distributional norm.”

\(^{50}\) This qualification reflects my rights-consequentialist view that rights-based States are obligated to protect specific rights if and only if doing so promotes the net rights-related interests of those for whom they are responsible. For a discussion of this issue, see Richard S. Markovits, \textit{Precommitment Analysis and “Societal Moral Identity,”} 81 TEX. L. REV. 1877, 1907-22 (2003).
The second set of moral rights are the corrective-justice rights of the members of a rights-based society. Corrective justice requires that “individuals who are responsible for the wrongful losses of others have a duty to repair the losses.” The corrective-justice rights of the members of a rights-based society impose moral obligations of repair on rights-violators and moral obligations on the governments of such societies to enable those whose corrective-justice-relevant moral rights have been violated to secure compensation from the rights-violators or, failing that, to provide government compensation at least to those victims of rights-violations whose failure to secure compensation from those who violated their rights was not their own fault.

The third type of moral rights to which a rights-based society is committed are distributive-justice rights. Distributive justice relates to the moral rights that moral-rights holders have to specifiable amounts of non-specific resources, to specific resources, and/or to particular opportunities for reasons unrelated to their being victims of the kinds of wrongdoing to which corrective-justice norms relate. More positively, distributive-justice norms assert that particular creatures have rights to such things because of their attributes (e.g., their possession of those attributes that make them moral-rights holders), their needs, their conduct, or (perhaps arguably but not persuasively to me) their having obtained the relevant resources in ways that do not involve their or anyone else’s having committed a rights-violation.

51 See Jules Coleman, Tort Law and Tort Theory: Preliminary Reflections on Method in PHILOSOPHY AND THE LAW OF TORTS (Gerald Postema, ed.) 183, 194 (2001). I should note that this Essay will assume that a rights-based State’s corrective-justice duties extend beyond enabling its “subjects” to enforce their moral right to repair legally. This assumption is non-standard.

52 This parenthetical manifests not just the moral unattractiveness to me of the libertarian distributonal standard that the next part of the sentence in which it is placed articulates but my belief that this norm is not a “moral” norm—that the concept of “a moral norm” is not socially negotiable and that it contains certain ineliminable elements that imply that the above libertarian “norm” is not a “moral” norm. For a further discussion of this issue, see note 42 supra, notes 115 and 116 infra, and MATTERS OF PRINCIPLE at 52.

53 Corrective-justice rights and distributive-justice rights do not map perfectly onto (respectively) negative rights and positive rights. Thus, although the corrective-justice-related right not to be wronged is a negative right, the right of repair and the prima facie rights to have the government deter wrongdoing, to provide victims of wrongdoing with appropriate opportunities to obtain compensation from the wrongdoers, and to compensate victims of wrongdoing who did not obtain such compensation through no fault of their own probably should be classified as positive rights. Similarly, although most distributive-justice rights are positive rights (in the sense of requiring the State to take action to secure the rights in question), distributive-justice norms also have negative-rights implications—e.g., that the State not take away from moral-rights holders resources or opportunities to which they are morally entitled. Admittedly, this last statement presupposes something that is not true—viz., that the government of a rights-based State is not morally responsible for the social and economic system that yielded the distribution of resources and opportunities that it might not be able to alter in particular ways without violating some moral-rights holder’s rights.
In the context of this Essay, it is important to point out that (with one possible exception) distributive-justice rights impose moral obligations on the governments of a rights-based society, not on its individual members when they are acting in non-political capacities (the exception relates to the performance of parental duties).

In my view, the concrete moral norms that underlie the concrete non-distributive-justice/corrective-justice-relevant moral rights, the corrective-justice moral rights, and the distributive-justice moral rights of the members of a rights-based society all derive from the basic moral principle that that society is committed to instantiating. However, although I believe that the set of concrete moral rights of the members of any given society can be uniquely derived from its basic moral principle, the relevant analysis is far from mechanical, and its conclusions will often be not only contested but contestable (though not, to my mind, essentially contestable).

In any event, I believe that all corrective-justice norms in the first two of the three categories just distinguished—all non-distributive-justice/corrective-justice-relevant norms and all corrective-justice norms—are “KS desert norms.” This conclusion reflects the fact that all such norms are “historical” norms—i.e., make relevant the histories of perpetrators and victims of the rights-violations to which they relate—and relatedly are concerned with the resources that particular individuals surrender and obtain rather than exclusively with the shape of a *desideratum* distribution. I also believe that some distributive-justice norms are “desert norms” in KS’ sense and some are not. This conclusion reflects the already-noted fact that some distributive-justice norms are concerned, perhaps *inter alia*, with which person occupies which position in the relevant distribution and some are not.54

Of course, many choices that people make that have a moral dimension do not affect anyone’s moral rights. More specifically, many if not most of the moral choices made by the governments and members of rights-based societies do not implicate moral rights, and (if I am correct in assuming that moral rights cannot be established through Foundationalist argument) none of the moral choices made by the governments and members of goal-based societies, of amoral societies, or of immoral societies will be rights-related. However, the fact that the relevant choices are not rights-related does not mean that they have no moral dimension. It simply

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54 The text’s statement implies that different rights-based societies may subscribe to different corrective-justice norms and different distributive-justice norms. This statement reflects my assumption that no Foundationalist argument can demonstrate the objective truth-value of a particular distributive-justice norm—that although the attributes of such norms are not totally socially negotiable (that although “distributive justice” has certain ineliminable content), different societies may be committed to different distributive-justice norms. See supra note 36.
implies that the choices in question are moral-ought choices, which should be evaluated through the application of what I term “personal ultimate values.” Since this set of norms includes all the moral norms to which the members of rights-based societies can be personally committed as well as the moral principles to which such societies can themselves be committed, the conclusion of the preceding discussion of the relationship between: (1) the category of “KS desert norms;” and (2) the moral principles to which rights-based societies may be committed and the personal ultimate values to which the members of such societies can legitimately subscribe applies in the current context as well—i.e., some but not all of the norms on which we are now focusing will be “desert norms” in KS’ sense.

D. KS’ Position on Whether Their Primary Conclusions Apply to “Adjudicators” as Well as to “Legislators”

To my surprise, some readers of an earlier draft of this manuscript challenged its assertion that KS believe that their primary conclusion that “legal rules should not be adjusted to disfavor the rich and favor the poor”—e.g., by making a liability decision or damages award depend on the income of the defendant relative to that of the plaintiff when it is not economically efficient to do so—applies to “adjudicators” as well as to “legislators.” I do not think that KS’ position on this issue is ambiguous. Although (to my mind, unfortunately) KS never explicitly address the possible difference between the obligations of “legislators” and “adjudicators,” some brief references in their 1994 article to the issues of “the function of courts in a democracy” and the ability of “courts . . . [to] accomplish significant redistribution through the legal system without attracting the attention of legislators” seem to me to demonstrate that they think that their recommendations apply to “adjudicators” as well as to “legislators.” This conclusion is also favored by two other facts. First, one of the authors of the KS articles has told me that, in his view, valid legal argument can rarely generate internally-right answers to legal-rights questions. This position has many supporters in legal academia. It is the articulated position of the vast majority of members of the Critical Legal Studies group and is also supported by some though not all scholars who are conventionally categorized as Legal Realists. Indeed, in my experience (which certainly is insufficient for me to suggest that my conclusions are based on anything like a rigorous empirical investigation), most contemporary law professors under the age of 45 believe that there is no internally-right answer to any legal-rights question whose internally-right answer is contestable or perhaps just socially contested. I hasten to add, however, that, again in my experience, the beliefs of many of

55 See KS 2000 at 821.
56 See infra Part VI.
57 See KS 1994 at 675.
58 This position has many supporters in legal academia. It is the articulated position of the vast majority of members of the Critical Legal Studies group and is also supported by some though not all scholars who are conventionally categorized as Legal Realists. Indeed, in my experience (which certainly is insufficient for me to suggest that my conclusions are based on anything like a rigorous empirical investigation), most contemporary law professors under the age of 45 believe that there is no internally-right answer to any legal-rights question whose internally-right answer is contestable or perhaps just socially contested. I hasten to add, however, that, again in my experience, the beliefs of many of
comment is relevant to the issue at hand since “adjudicators” will not be in a position that is essentially different from the position of “legislators” when there is no internally-right answer (not even an answer provided by a default rule) to the legal-rights question they have been assigned to decide.59

Second, the conclusion that KS believe that their primary normative recommendation applies to “adjudicators” as well as “legislators” is favored by the also-already-mentioned fact that in another article60 KS reject as possibly incoherent and certainly undesirable the kinds of moral norms that I think are inside the law of rights-based societies. Indeed, I think that the moral principle to which a rights-based society is committed is not just inside the law but forms the basis of a mode of argument (arguments of moral principle) that dominates legitimate and valid61 legal argument in

these scholars are not based on any serious consideration of the relevant philosophical and jurisprudential issues, and many of the relevant professors qualify this position substantially when it is subjected to serious scrutiny. See generally, Symposium on Taking Legal Argument Seriously, 74 CHI.-KENT L. REV. 337-614 (Richard S. Markovits, ed., 1999) and Richard S. Markovits, Taking Legal Argument Seriously: An Introduction, 74 CHI.-KENT L. REV. 337 (1999). I recognize, of course, that academics generally find it inappropriate to make reference to private conversations or unpublished oral communications. I depart from this practice for the following reason: since Law & Economics scholars make many arguments that implicitly assume the correctness of a large number of epistemological, moral, and political-philosophical positions that they never put into writing much less attempt to justify in print, there is a considerable cost to ignoring unpublished oral communications in which they assert these beliefs and attempt to justify them in various ways.

59 At least, the footnoted textual proposition will be true if one deems irrelevant the fact that individuals who believe that there are not internally-rights answers to many or most legal-rights questions may still believe that there are more internally-wrong answers to these questions than to the questions that confront legislators.

60 See KS 2001.

61 In our type of society—i.e., in rights-based societies, arguments that derive from the moral principle the society is committed to instantiating in its moral-rights discourse and conduct are the dominant mode of “legitimate” legal argument—i.e., of argument whose use is consistent with the moral commitments of the society in question. In some situations, “legitimate” legal argument may differ from “valid” legal argument—i.e., argument that determines the internally-right answer to the legal-rights question at issue. In particular, when the constitution of a rights-based society contains provisions that are inconsistent with its moral commitments and whose meaning was clearly understood by its ratifiers, textual and historical argument based on such illegitimate constitutional provisions will dominate arguments of moral principle. Of course, the fact that a society has failed to remove an illegitimate constitutional provision that has some social importance counts against its being a society of moral integrity. Although the original United States Constitution contained slavery clauses that were illegitimate and illegitimately failed to obligate the states to secure the rights-related interests of those for whom they were responsible, I do not think that the contemporary U.S. Constitution contains any illegitimate provisions (though one might argue that the provision giving each State the same number of representatives in the Senate and the provisions that relate to the electoral college are illegitimate). I therefore think that in the contemporary United States legitimate and valid legal argument almost always coincide.
In rights-based societies, arguments of moral principle dominate legitimate legal argument in that they operate not only directly but also indirectly (1) to determine the legitimacy (and usually the validity) of the other modes of argument that are made to convince adjudicators that a particular legal-rights conclusion is internally correct, (2) to determine the variants of these other general modes of argument that are legitimate, and (3) to determine the argumentative force of the specific legal-rights arguments that are legitimate and/or valid.

For a detailed account of how the dominance of arguments of moral principle favors the existence of internally-right answers to legal-rights questions, see Richard S. Markovits, Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions, 74 CHI.-KENT L. REV. 415, 433-34 (1999). I should admit, however, that a belief in the dominance of arguments of moral principle is not a necessary condition for a belief in the existence of internally-right answers to legal-rights questions. One could also support the internally-right-answer hypothesis by claiming that the combination of arcane legal argument (argument that is unconnected with the moral commitments of the society in which it takes place) and negative default-rules (plaintiff loses unless he can establish his legal right through arcane legal argument) will yield internally-right answers to all legal-rights questions. Indeed, at least in relation to moral-rights-related (“fundamental fairness”) Constitutional rights, American Strict Constructionists take just this position.
(1) the pleasure (satisfaction, fulfillment) he can obtain by performing labor that would yield him different earned incomes;
(2) the pleasure he would obtain by doing those things he would have to do to increase his earning ability;
(3) his emotional reaction to receiving resources through luck, gift, or bequest;
(4) the pleasure or displeasure he would experience or did experience to increase by varying amounts the certainty-equivalent amount of gifts and bequests he receives;
(5) the amount of benefits he obtained or costs he incurred when others consumed resources either because of the conventional externalities that their consumption generated or because he valued or disvalued the consumption of (particular) others; and
(6) various other things that might affect the well-being that different individuals would experience if they could use various equal amounts of resources in any (non-rights-violating) way they pleased such as:
   (A) physical handicaps (e.g., blindness);
   (B) physical illnesses;
   (C) mental illnesses;
   (D) psychological dispositions such as happy-go-lucky personalities or tendencies to be pessimistic or mildly depressed;
   (E) physical ineptitudes such as klutziness, which may lead to frustration even if it does not lead to self-inflicted injuries or losses;
   (F) talents such as the ability to appreciate music or play instruments that may increase their possessor’s ability to obtain pleasure, satisfaction, and fulfillment from leisure;
   (G) attributes and interpersonal skills that facilitate the formation of satisfying interpersonal relationships;
   (H) satisfying interpersonal relationships themselves; and
   (I) intellectual deficiencies (deficiencies in their consumer sovereignty or ability to maximize, given their perception of the value of things to them, which affect the losses their consumption-errors impose on them), etc.

KS 1994 said nothing explicit about either of these sets of issues. However, both KS 1994 and KS 2000 did take some positions that have implications for the way in which they must be resolving the first set of issues, and KS 2000 did explicitly address the second set of issues.

Unfortunately, the implications of the relevant passages in KS 1994 and KS 2000 for KS’ resolution of the first richness-metric issue are inconsistent. Thus, on the one hand, three facts suggest that KS’ repeated assertions in both KS 1994 and KS 2000 that distributional norms favoring transfers from the rich to the poor or *vice versa* can be fully effectuated
through income-tax policy imply that they are defining richness to depend on both earned income and unearned income but not on potential income or wealth: (1) The fact that the concept of “income” in our current income-tax legislation includes unearned income (including capital gains) as well as earned income; (2) the fact that the concept of income in our current income-tax legislation refers to actual but not potential income; and (3) the fact that KS’ stipulation that “income-tax policy” in their sense “include[s] possible transfer payments to the poor” seems to be intended to make the concept cover negative income taxes. On the other hand, since taxes on unearned income (and taxes on wealth) distort not only “work incentives” but also incentives to choose among present consumption, future consumption, present gift-giving, future gift-giving, and “bequesting,” KS’ insistence that income-tax policy will generate only one type of distortion (“work-incentives” distortions) seems to imply (1) that they are assuming that “income” for income-tax purposes refers solely to earned income and, derivatively; (2) that they are defining “richness” solely in terms of earned income.

In fact, I think that KS’ claim that “income-tax” policies generate only one type of distortion manifests either their making a straightforward error or, more likely, their making a self-conscious omission to simplify their exposition rather than their believing that “income” should be equated with earned income and that richness should be defined solely in terms of earned income.64 This assessment is favored, inter alia, by the fact that—as Part II points out—KS can define “income” for “income-tax” purposes in ways that cause income taxes to generate more than one type of distortion without undermining their claim that such taxes will generate only one type of distortion fewer than the distributionally-motivated legal-rule adjustments they

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64 Taxes on potential income would actually counteract the distortions in the incentives to invest in one’s human capital generated by taxes on earned and unearned income—i.e., a tax on potential earned income that was fully enforced would generate no distortion in the profitability of investing in one’s human capital whereas, ceteris paribus, taxes on actual earned and unearned income deflate the profitability of investing in one’s human capital by the extra taxes the investor will have to pay on any additional earned or unearned income this investment would cause him to generate. I should admit that the actual aggregate distortion in the profitability of investing in one’s human capital reflects a large number of other imperfections in our system—e.g., (1) the fact that the private cost of education to its consumer does not equal its marginal allocative cost, (2) the fact that an individual’s investment in his human capital is usually neither expensible nor depreciable, (3) the fact that an individual’s investment in his human capital may affect the amount of surplus his labor generates both for his employer and for the consumers of the products produced by his employer and his employer’s product-rivals, (4) the fact that an individual’s investment in his human capital may affect the net externalities of consumption the investor generates, and (5) the fact that our tax laws do not make an individual’s tax liability depend on the satisfaction he gets from working or the number of hours he works (both of which may be affected when an individual’s investment in his human capital changes both the job he performs and his wage-rate).
oppose (e.g., than policies that make an individual’s civil liability or damages-obligations a function of his income as defined). Hence, I think that the best reading of KS’ Double-Distortion-Argument articles is that they have resolved the first richness-metric issue by defining “richness” to be an increasing function of earned and unearned income but not of potential income of wealth. My exposition of their position reflects this conclusion.

Although KS 1994 does not explicitly address the second richness-metric issue articulated above, KS 2000 does do so. More specifically, in this reply to Sanchirico,65 KS make it absolutely clear that, on their definition, an individual’s richness depends solely on his tax-law-defined income.66 The fact that KS resolve the second set of richness-metric issues in this way is consistent with their insistence that the kind of tax policy that will be needed to redistribute income from the rich to the poor (or vice versa) will generate only one type of distortion, given that a tax law that makes an individual’s tax liability depend (for example) on his disabilities, health, interpersonal skills, and social relationships will generate additional distortions on that account. In particular, such a tax policy will deflate the taxpayer’s incentive to avoid injuries and illnesses as well as his incentive to develop interpersonal skills and relationships.

Now that we have determined the way in which KS define an individual’s “richness,” it should be possible to assess the extent to which policies that redistribute resources from “the richer” to “the poorer” in their sense of these expressions will instantiate the different types of egalitarian distributional values that tend to favor redistributions from “the richer” to “the poorer” in the everyday language sense of these concepts. At least four types of such egalitarian norms are worth distinguishing in this context.

The first is equal-utility egalitarianism. Evaluators who believe that all moral-rights bearers ought to have the same utility tend to favor redistributions from “the rich” to “the poor” because the rich tend to have more utility than the poor. Nevertheless, for two reasons, the kinds of redistributions that KS assume are to be effectuated—redistributions from individuals with higher (earned plus unearned) incomes to individuals with lower incomes—will not be ideal from this equal-utility-egalitarian perspective.

First, even if all individuals would obtain the same amount of utility from any given combination of income and wealth, the redistributions that KS assume are to be effectuated would be imperfect from an equal-utility-egalitarian perspective because they would ignore differences in the wealth positions of the individuals concerned—i.e., would ignore the fact that

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65 See KS 2000 at 828.
66 KS do not address whether an individual’s “richness” should be measured annually or on a lifetime basis or, derivatively, the tricky issue of how an individual’s “lifetime income” relates to the series of his annual incomes.
wealth gives its possessor utility by financing consumption in excess of income, by providing security against downswings in income, and by raising the social status of its possessor. Thus, a redistribution from a “richer” individual to a “poorer” individual in KS’ sense of these words would be disfavored by an equal-utility egalitarian if the individual with higher income (the “richer” person according to KS) had sufficiently lower wealth than the individual with lower income (the “poorer” person according to KS) in the initial position to have had utility prior to the tax policy’s implementation that exceeded the KS-“poorer” person’s utility at that time by a sufficiently small amount for the tax policy to increase the disparity between these two individuals’ utility-levels.

Second, even if KS’ definition of “richness” were altered to reflect the wealth as well as the income of the individual in question, the redistributions from “the richer” to “the poorer” that KS assume are to be effectuated would be non-ideal and might even be undesirable from the equal-utility-egalitarian perspective because KS’ metric for “richness” would still ignore all those factors other than income and wealth that affect the utility of an individual. Thus, a redistribution from a person who was “richer” to a person who was “poorer” in income/wealth terms might be disfavored by an equal-utility egalitarian if the person with more income and wealth were sufficiently more ill, injured, depressed, klutzy, unsatisfied by the labor he performed and/or leisure he consumed, socially unskilled, relationally-deprived, or unskilled in his consumption decisions than the person with less income and wealth to have sufficiently lower utility in the initial position on these accounts than the person with lower income and wealth for the former individual’s utility in the initial position to exceed the utility of the latter person in the initial position by a small enough amount for the KS redistribution to increase the disparity in their utilities.67 Of course, the failure of the tax policies that KS assume are to be effectuated to reflect both (1) the wealth of the parties in question; and (2) the various other factors (other than the resources under their control) that would affect the relevant parties’ utilities might perfectly counteract each other from an equal-utility-egalitarian perspective, but there is no reason to believe that they would do so (indeed, no reason to believe that they would tend to counteract each other at all).

A second variant of egalitarianism that would tend to favor redistributions from “the richer” to “the poorer” in the ordinary-language sense of these concepts is equal-resource egalitarianism. This type of egalitarianism values each person’s having the same amount of resources (presumably valued in allocative-product terms) over his lifetime to do with as he pleases. Even if one ignores KS’ failure to discuss the difficult issue of how

67 See supra note 66.
to convert a series of annual positions into a lifetime position, the redistributions from “the richer” to “the poorer” that KS assume are to be effectuated might be non-ideal or even counterproductive from an equal-resource-egalitarian perspective.

Admittedly, on two accounts, equal-resource egalitarians would find KS’ metric for “richness” or the tax policies deemed to redistribute income from “the richer” to “the poorer” in KS’ usage less unsatisfactory than would equal-utility egalitarians. First, equal-resource egalitarians would not favor redistributions’ taking account of the various factors that may cause different individuals who have the same incomes and wealth to experience different amounts of utility. Second, and relatedly, equal-resource egalitarians would not favor redistributions’ reflecting differences in various individuals’ lifetime income/wealth positions (and hence differences in their wealth at particular times) that manifest differences in the time value of money to them or differences in their abilities to make saving/consumption decisions that are optimal from their respective perspectives.

Still, because equal-resource egalitarians would want redistributions to reflect differences in the relevant parties’ wealth that are attributable to such other factors as differences in the resources they obtained through gifts or bequests or through the type of “luck” that does not result in the associated increase in their assets’ being classified as “income,” equal-resource egalitarians would find many of the redistributions KS assume are to be effectuated less than ideal and some of these redistributions undesirable. Thus, an equal-resource egalitarian might well disapprove of a redistribution from a person with a higher income but no wealth generated by gift, bequest, or luck that did not give rise to taxable income to a person with a lower income but considerable inherited wealth.

A third type of egalitarianism that would tend to favor redistributions from “the richer” to “the poorer” would be non-liberal equal-opportunity egalitarianism. Because the members of this family of egalitarian values favor different, specific opportunities being equally available to all, I will focus my analysis on a particular variant of this family of egalitarian values—the variant that focuses on the opportunity to perform important social roles in a competent manner. Individuals who subscribe to this value tend to support redistributions from “the richer” to “the poorer” in the everyday-language sense of these expressions because, in our culture, differences in the income/wealth positions of an individual and his/her family affect the opportunity the individual has to perform valued social roles competently by affecting the quality of the individual’s general formal education, the range of experiences to which he or she is exposed, the individual’s self-confidence and more general feelings of self-worth, his or her ability to prepare specifically for or to obtain help in relation to particular job-application processes, the connections that the individual and the individual’s family can utilize to secure him or her positions, etc. Of course,
equal-opportunity egalitarians of this type will favor redistributions that take account not just of the income position of an individual but also of the individual’s wealth position, the income/wealth position of his or her family, and the education and socio-economic status of the individual’s parents. For this reason, this type of equal-opportunity egalitarian may find counter-productive redistributions from higher-income to lower-income groups when the higher-income individuals and families in question have lower wealth, worse educations, and lower socio-economic status than the relevant lower-income individuals and families have.

The fourth and final type of egalitarian norm that should be distinguished in the current context is the liberal norm that each creature that has the neurological prerequisites to lead a life of moral integrity—roughly speaking (in a rights-based society), to take its moral obligations seriously, to give serious consideration to the personal ultimate values to which it individually subscribes, and to make choices that instantiate those values—should have an appropriate, equal opportunity to actualize this potential. Admittedly, the opportunity that an individual has to lead a life of moral integrity is a function of many things other than the material resources at his or her disposal—viz., depends *inter alia* on: (1) the extent to which the individual’s upbringing gave him the psychological wherewithal to make his or her own value-choices; (2) the extent to which the society in which the individual lives protects his or her privacy (secures his or her secrecy, solitude, and anonymity68—thereby enabling the individual to engage in unselfconscious contemplation, to experiment with value and life-style choices at lower cost, and to form intimate relationships);69 (3) the extent to which the society in which the individual lives permits and pro-actively facilitates the individual’s forming and maintaining intimate relationships, which enable him or her to discover what he values and to instantiate the values he has chosen (as well as the principles to which his membership in a rights-based society commit him); and (4) the extent to which the society in which the individual lives protects and pro-actively fosters his or her exercise of various other liberties that will enable the individual to discover and instantiate his or her values. However, the opportunity an individual has to lead a life of moral integrity will also depend on the material resources at his or her disposal—(1) on whether he has enough resources to be able to think about his obligations and personal values as opposed to his


69 I realize, of course, that to some extent the amount of privacy an individual has depends on the material resources at his disposal. For example, a person living with his parents or sharing an apartment with friends will have less privacy, other things, being equal, than someone living in his own accommodation. However, the law of privacy and various pro-active steps the State can take to protect privacy will affect its members’ privacy, even given the resources at their disposal.
discomfort, ill-health, and survival; (2) on whether (in our materialist soci-
ety) he has enough resources to be able to take himself and his life morally seri-
ously; (3) on whether he has been able to purchase (if he has not been
given) a liberal formal education that exposes him to various value and life-
style alternatives and trains him to think clearly about those and other sorts
of choices; (4) on whether he has the resources that facilitate his observing
others who have made a variety of value and life-style choices; and (5) on
the extent to which the material resources at an individual’s disposal enable
him or her to protect his or her privacy and to meet and interact with others
in circumstances and ways that facilitate his or her developing and main-
taining intimate relationships, etc.

Nevertheless, although liberalism favors some transfers from “the
richer” to “the poorer,” it will not favor all tax policies that tend to equalize
the income positions of those they affect or indeed even some tax policies
that equalize the income/wealth positions of those they affect. In part, this
conclusion reflects the fact that—once an individual has the resources he
requires: (1) to have self-respect; (2) to be able to turn his mind to things
other than his survival, physical comfort, and health; (3) to secure the for-
mal education that contributes significantly to his ability to discern and
analyze the moral alternatives available to him; and (4) to secure the pri-
vacy and exercise the liberties that significantly affect his ability to dis-
cover and instantiate his values—liberalism may not value an individual’s
receiving the additional resources needed to bring his income or in-
come/wealth position up (say) to the society average. 70 And in part, the
conclusion articulated in the first sentence of this paragraph reflects the fact
that different individuals who have the neurological prerequisites to lead
lives of moral integrity require different amounts of resources to actualize
their potential to do so. Thus, a liberal would disfavor a policy that would
equalize the income or income/wealth positions of two individuals if the
person who began with the superior income or income/wealth position was
a Helen Keller, who required resources the “equalizing” tax policy would
take away from her to actualize her morally-defining potential to lead a life
of moral integrity, while the beneficiary of the tax policy in question origi-
nally had enough resources to be able to take his life morally seriously.

70 I say “may not” because one could argue that the liberal commitment to showing appropriate,
equal concern for each person extends beyond concern for each person’s actualizing his potential to lead
a life of moral integrity to include a concern for his well-being that implies that the same weight should
be given to all such persons’ individual units of utility (a concern that would tend to make those who
have it favor all relevant individuals’ being allocated the same amount of resources) or that each rele-
vant moral-rights holder should be given the “same opportunity” to achieve his more “concrete goals”
(obviously, the meaning of the two enquoted expressions needs to be examined).
Obviously, the peculiarity of KS’ stipulative definition of “richness” and “poorness” does not affect the validity of their argument for the proposition that (transaction-cost considerations and other Pareto imperfections aside) it will be more economically efficient to equalize the “richness” of individuals in their sense of that word through tax policy than by making a defendant’s legal liability and legal-damages obligations turn on his “richness” in their sense. Moreover, as I have just suggested and will explain in more detail in Part II, an Extra-Distortion-Argument analog to KS’ Double-Distortion-Argument argument can also establish the economic-efficiency conclusion on which KS rely when the value to be instantiated favors the equalization of many things that are more complicated than their impoverished conception of richness. I have devoted so much space to KS’ conception of “richness” despite these facts because their treatment of “richness” manifests the kind of value-insensitivity with which two of the preceding three subparts of Part I were also concerned. My conclusion that KS are insensitive to many of the values on which prescriptive-moral evaluations in our cultures are based—or, to be fair, my conclusion that KS’ suggestion that many of these values seem incoherent and/or indefensible are erroneous—plays a central role in my critique both of some of the narrower claims that KS appear to be making (see Part V’s discussion of KS’ denigration of their initial desert-norm qualification to their prescriptive-moral conclusion) and of the broader prescriptive-moral claims their Double-Distortion-Argument articles contain (in particular, their claim that “normative economic analysis of legal rules should focus on their efficiency”).

II. THE DOUBLE-DISTORTION ARGUMENT AND KS’ NEED TO RELY ON ITS EXTRA-DISTORTION-ARGUMENT ANALOG

KS contend that the Double-Distortion Argument demonstrates that, transaction-cost considerations aside, it will always be less-economically-inefficient to use tax policy to redistribute income from “the richer” to “the poorer” (or vice versa) than to effectuate any desired redistribution of this type by adopting economically-inefficient “legal rules” that make the decision on whether a defendant is liable and/or the decision on the amount of damages a defendant who is liable must pay the plaintiff a function of the “richness” of the defendant relative to the “richness” of the plaintiff. In fact, however, the Double-Distortion Argument applies only when the desired redistribution is a redistribution between or among earned-income classes and the less-economically-inefficient tax policy required to secure it

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71 See KS 2000 at 821 and 834.
taxes only earned income. Since even KS seem to admit that an individual’s “richness” is a function of his unearned as well as his earned income and since (although they never explicitly say so) KS almost certainly would acknowledge that an individual’s richness also increases with his wealth, they should have relied on an Extra-Distortion Argument analog to the Double-Distortion Argument to prove their point.

This part will establish this conclusion in three stages. Part II.A begins by explaining the Double-Distortion-Argument justification for the conclusion that, transaction-cost considerations aside, in an otherwise-Pareto-perfect world, earned-income tax policy will be able to redistribute resources among earned-income classes less-economically-inefficiently than could extra-distortion-generating adjustments in legal rules—viz., the argument that earned-income tax policy will distort only one type of incentive to effectuate such redistributions whereas the relevant legal-rule adjustments will distort two types of incentives to do so. Next, Part II.B explains why earned-income tax policy will not be able to redistribute income from “the richer” to “the poorer” (or vice versa) even on KS’ definition of these concepts and, relatedly, why tax policy will not be able to effectuate such redistributions without generating double distortions (or more than two distortions if “richness” is defined in a way that makes redistributions from “the richer” to “the poorer” as defined most attractive to those egalitarians who would say that they favor such redistributions). Finally, Part II.C explains why the tax policy needed to redistribute resources from “the richer” to “the poorer” on either KS’ reductionist definition of these terms or a more comprehensive definition will generate one type of distortion fewer than the adjustments in legal rules needed to do so—i.e., will generate one fewer distortion even if, in addition to the relevant individual’s earned income, the metric for an individual’s “richness” reflects his unearned income and wealth or his actual unearned income, wealth, potential earned income, physical and mental health and disabilities, ability to make sovereign, maximizing consumption-choices, affective disposition, social skills and relationships, liking of the labor he performs, and general ability to enjoy work and leisure activities.


According to the Double-Distortion Argument, transaction-cost considerations aside, in an otherwise-Pareto-perfect world, it will be less-economically-inefficient to redistribute income between earned-income classes by adjusting taxes on earned income than by sacrificing economic
efficiency by adjusting liability-rules and damage-rules to make legal outcomes depend on the earned income of the defendant relative to the earned income of the plaintiff. 73 This conclusion reflects the fact that the tax-policy adjustment will distort only “work incentives”74 while the legal-rule adjustment will distort incentives to commit the acts to which the relevant legal rules relate (for example, will distort “tort-loss-avoidance incentives”)75 as well as distorting “work incentives” to the same extent that the tax would do—i.e., will tend to cause a second kind of misallocation in addition to the same amount of the kind of misallocation the tax policy would cause.76

As KS point out,77 commentators who fail to acknowledge that the Double-Distortion Argument favors using earned-income tax policy rather than economically-inefficient adjustments in “legal rules” to redistribute resources between or among earned-income classes make this error because they fail to realize that the adjustments in “legal rules” they are advocating will have the same effect on “work incentives” as the earned-income tax-policy adjustments that could be substituted for them. These commentators forget that, if the relevant individuals are sovereign maximizers and we simplify by ignoring risk aversion, a legal-rule adjustment that would cause the (weighted-average-expected) amount of tort damages they would have to pay to rise (the amount of tort damages they would expect to collect to fall) by X% of any additional income they earned would have the same distorting effect on the “private profitability” to them of earning any given amount of additional income as would a tax provision that would increase their tax liability by X% of any additional income they earned.

73 More precisely, on whether the relevant legal decision will reduce the disparity in the plaintiff’s and defendant’s earned incomes by more than any alternative would do.

74 I.e., ceteris paribus, will cause economic inefficiency only by distorting choices among different types of market labor, do-it-yourself labor, and leisure.

75 Thus, ceteris paribus, a legal rule that would require a potential injurer who knew that his earned income was substantially higher than his prospective victims’ to pay damages to his actual victims that exceeded the loss he imposed on them would inflate his avoidance-incentives and thereby tend to make him over-avoid from the perspective of economic efficiency—i.e., to make avoidance-moves whose allocative cost exceed their ex ante allocative benefits.

76 As I have already suggested, the Double-Distortion-Argument argument also demonstrates that, transaction-cost considerations aside, it will be less-economically-inefficient to redistribute income between or among earned-income classes by adjusting earned-income tax-rates than by making decisions on whether someone must pay a civil fine, the size of any civil fine levied on a particular individual, or the price someone must pay for a particular good or service depend on his earned income. I should add that tax policy will also be able to effectuate the relevant distributional norm more thoroughly than could a legal-rule-adjustment, civil-fine, or pricing policy, though (of course) this observation would be relevant only if the latter policies were being proposed as alternatives to rather than supplements to the tax policy.

77 See KS 2000 at 823.
B. KS’ Stipulative Metric for “Richness,” the Metric for “Richness” That Egalitarians Who Favor Redistributions From “the Richer” to “the Poorer” Implicitly Use, and the Ability of Tax Policy to Effectuate Redistributions From “the Richer” to “the Poorer” on Either of the Above Metrics While Generating Only One Type of Distortion

The Double-Distortion Argument presented in Part II.A is correct. However, strictly speaking, it applies only when the redistribution to be (perfectly) effectuated is a redistribution between or among earned-income classes (when the valued redistribution can be effectuated perfectly through a tax on earned income). When the distributional value to be instantiated deems relevant things other than an individual’s earned income, the tax required to effectuate it will have to vary with things other than the relevant individuals’ earned incomes. Moreover, since virtually all of those “other things” will be at least somewhat influenced by choices that the relevant taxpayers (and in some instances others who cathect their welfare) can make, the tax policy that will have to be adopted to effectuate such values will generate more than one kind of distortion.

Since KS define an individual’s “richness” to depend on things other than his or her earned income—in particular, to increase as well with the individual’s unearned income, the preceding conclusion implies that the kind of tax policy KS are commending will not be able to effectuate the kinds of distributional norms whose effectuation KS are commending—redistributions from “the richer” to “the poorer” (or vice versa) in their senses of these expressions—without generating double distortions—in particular, without distorting incentives to choose among consumption, saving, current gift-giving, future gift-giving, and “bequesting” as well as what KS call “work incentives.” This conclusion would apply a fortiori if KS acknowledge that the relevant conception of an individual’s “richness” depends on his wealth as well as on his unearned and earned income.

Moreover, Part I.E’s discussion of the wide range of factors other than earned income, unearned income, and wealth that at least some egalitarians would say that they value redistributions from “the richer” to “the

78 Decisions to impose taxes on wealth and on unearned income if that concept is defined to include gifts and bequests will also decrease the incentives of individuals to behave in ways that increase the certainty-equivalent gifts and bequests they should anticipate receiving. However, it is difficult to say whether conduct in which an actor would not engage but for its tendency to increase the gifts and bequests he receives is likely to be economically efficient. The answer to that question depends inter alia on such issues as whether the induced gifts or bequests generate equivalent-dollar benefits for the donor or testator as well as for the donee and on whether the conduct in question induces the relevant donor or testator to make additional gifts or bequests or simply redirects gifts or bequests he would have made to someone in any event.
poorer” would want to be taken into account implies that tax policy will not be able to effectuate these types of egalitarian distributional values without generating more than the two types of incentive-distortions that would have to be generated to effectuate the kinds of values on whose effectuation KS are concentrating. Thus, tax policy will not be able to take account of:

1. an individual’s physical or mental health without distorting his incentive to avoid becoming ill or to take the steps necessary to make an economically-efficient recovery;
2. an individual’s physical disablement without distorting his incentive to avoid injury and secure economically-efficient rehabilitation;
3. an individual’s general emotional disposition without distorting his incentive to do something about it;
4. an individual’s social skills or the quality of his interpersonal relationships without distorting his incentives to improve them;79
5. an individual’s potential earned income without distorting his incentives to invest in his human capital; and
6. an individual’s ability to make the consumption choices he would make if he were a sovereign maximizer without distorting his incentives to invest in increasing this ability or to use his current capabilities when making consumption choices.

C. The Extra-Distortion Argument for the Economic Efficiency of Using Tax Policy Rather Than Economically-Inefficient Adjustments in Legal Rules to Effectuate Norms That Favor Redistributions From “the Richer” to “the Poorer” When an Individual’s “Richness” Is Defined to Reflect More Things Than His or Her Earned Income

The fact that tax policy will have to generate more than one type of distortion to redistribute resources from “the richer” to “the poorer” in either KS’ conception of those concepts or the conceptions of those concepts various egalitarians are implicitly adopting when they advocate redistributions from “the richer” to “the poorer” does not imply that, transaction-cost considerations aside, it will be as economically efficient or more economically efficient to effectuate such redistributions through economically-

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79 Indeed, the fact that the more skilled social behavior in which an individual engages and the more fulfilling social relationships he forms will tend to generate external benefits for the other individuals with whom he is interacting implies that the distortion that a tax policy that makes the positive tax an individual must pay a direct function (the transfer an individual receives an inverse function) of his social skills and the quality of his interpersonal relationships will generate more misallocation than would otherwise be the case (implies that this tax distortion will compound the externality distortion in the profitability of the choices in question).
inefficient adjustments in legal rules as through tax policy. In particular, with a Second-Best-Theory-related qualification that KS would clearly accept, the greater economic efficiency of the tax policy (transaction-cost considerations aside) can always be established by an Extra-Distortion-Argument analog to the Double-Distortion Argument that KS claim (mistakenly but not seriously mistakenly) establishes their economic-efficiency conclusion. This result follows from the fact that a tax policy that makes the taxes individuals must pay and the transfers individuals receive a function of some subset of their earned incomes, unearned incomes, wealth, potential earned incomes, health, disablement, disposition, social skills and relationships, and/or consuming skills will always generate one fewer incentive-distortion than an economically-inefficient legal-rule adjustment that makes liability-decisions and damage-awards a function of the same subset of those factors in that, unlike the legal-rule adjustment, the tax policy will not distort the incentives of the individuals in question to commit the acts to whose commission the legal rules relate.

The Second-Best-Theory-related qualification reflects the possibility that in a world in which taxes and the distortions generated by the relevant legal-rule adjustment are not the only Pareto imperfections, the extra distortion generated by the legal-rule adjustment may increase economic efficiency by reducing the aggregate distortion in the relevant incentives by counteracting the distortion in those incentives caused by the other Pareto imperfections that would be present in its absence and/or by counteracting the tendency of the relevant actors to make various types of errors when making the choices whose “profitability” it affects. KS’ initial statement of their economic-efficiency conclusion protects them against this type of Second-Best critique by limiting their conclusion that it will be more economically efficient to redistribute resources from “the richer” to “the poorer” through taxes than through legal-rule adjustments to legal-rule adjustments that are economically inefficient. However, their subsequent denigration of this qualification is far more open to question.

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80 Actually, of the relative positions of the plaintiff and defendant in relation to the same subset of those factors.

81 See infra Part VIII.
Economists define the expression “more economically efficient” in such sentences as “Method A is a more-economically-efficient method of achieving a certain result than is Method B” in three different ways. First, they sometimes define this concept in a “Pareto-superior” sense. Method A is said to be “more economically efficient” than Method B in the Pareto-superior sense of the enquoted expression if and only if somebody would be better off and nobody worse off if Method A were used instead of Method B—i.e., if and only if the position Method A would secure would be Pareto-superior to the position Method B would secure. Second, economists sometimes define the concept “more economically efficient” in this sort of context in a “potentially-Pareto-superior” sense. Method A is said to be “more economically efficient” than Method B in this “potentially-Pareto-superior” sense if and only if the combination of Method A and an appropriate, transaction-costless transfer-policy would secure a societal outcome that was Pareto superior to the outcome that Method B would secure. Third, most often in practice, economists implicitly adopt what I call the “monetized” definition of “more economically efficient.” Method A is said to be “more economically efficient” than Method B in the monetized sense of the enquoted expression if the equivalent-dollar gains that a transaction-costless switch from Method B to Method A would confer on its beneficiaries would exceed the equivalent-dollar losses this switch would impose on its victims.82

For the most part, KS seem to have implicitly adopted the monetized definition of “more economically efficient.” At least, this conclusion is favored by the fact that the Extra-Distortion Argument demonstrates that,

82 The word “equivalent” is used because the relevant dollar gains and losses may never show up in the relevant parties’ dollar holdings—indeed, may not even be capitalizable by the parties (as they would not be for the beneficiary of an environmental policy that increased the dollar value to him of a piece of property he owned that no-one else would value positively even after the environmental policy in question was implemented). Roughly speaking, a choice’s beneficiaries’ total equivalent-dollar gains equal the number of dollars they would have to receive “in an inherently neutral way that did not affect them indirectly by conferring equivalent-dollar gains and imposing equivalent-dollar losses on others” to be made as well off as the choice would leave them, and a choice’s victims’ total equivalent-dollar losses equal the number of dollars they would have to lose “in an inherently neutral way that did not affect them indirectly by conferring equivalent-dollar gains or imposing equivalent-dollar losses on others” to be left as poorly off as the choice would leave them. For an account and explanation of the enquoted material in the preceding sentence and partially-related critiques of the Kaldor-Hicks test for “an increase in economic efficiency” and the Coase Theorem, see Markovits, supra note 4, at 491-98.
transaction-cost considerations aside, tax policy will be a “more economically efficient” method to effectuate certain distributitional norms than economically-inefficient adjustments to legal rules only if “more economically efficient” is defined in the monetized sense specified above. Thus, the Extra-Distortion Argument would not justify the above “more economically efficient” conclusion in the Pareto-superior sense of the enquoted expression because the “overavoidance” that legal-rule adjustments might engender would benefit the avoider’s potential victims and might benefit suppliers of the resources the induced avoidance would consume.

Similarly, for two reasons, the Extra-Distortion Argument would not always justify the above “more economically efficient” conclusion in the potentially-Pareto-superior sense of the enquoted expression. First, because—even if (as the standard definition of potentially-Pareto-superior assumes) the required resource-transfer could be executed without generating any mechanical transaction costs—the political activity that would culminate in the substitution of the tax policy for the allegedly-inferior legal rule might well generate allocative costs that exceed the increase in monetized economic efficiency that would be generated by a transaction-costless switch from the relevant legal-rule adjustment to the relevant tax policy. Second, because in our Pareto-imperfect economy any counterfactual, hypothetical resource-transfer whose combination with the tax policy would otherwise create a policy-package that was Pareto superior to the legal-rule adjustment in question might generate a net economic-efficiency loss that exceeded the economic-efficiency gain the shift from the economically-inefficient legal rule to the tax policy would generate. In particular, the required transfer might cause a decrease in economic efficiency by dis-satisfying people’s (equivalent-dollar) distributitional preferences and by inducing its direct beneficiaries and victims to make on-balance economically-inefficient alterations in their non-leisure consumption decisions, their market-labor/do-it-yourself-labor/leisure decisions, their saving/consumption decisions, and their gifting/bequeathing/consumption decisions.

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83 I.e., avoidance that is economically inefficient.

84 Admittedly, the text’s argument assumes that the adoption of the tax policy would trigger a campaign for and against its Pareto-superiority-securing transfer-policy complement (which would confer losses on some individuals) and that the relevant adjustment in the legal rule would trigger no similar transfer-policy campaign. Although this assumption seems unrealistic, it is consistent with the comparison on which KS focus—the comparison of the legal-rule adjustment with a tax-and-transfer policy-package.

85 For example, by increasing the income/wealth position of its beneficiaries, the relevant resource-transfer might make it profitable for people who would otherwise take public transport or walk to buy polluting, breakdown-prone cars that would otherwise be junked whose purchase by them was rendered misallocative by the external character of the added pollution and congestion costs that would result from their operation of the cars in question.
that exceed the (monetized-sense net) economic-efficiency gain the shift from the legal-rule adjustment to the tax policy (as opposed to the tax-plus-transfer policy-combination) would generate.

However, in some passages,\(^86\) KS assert that the Double-Distortion (read, Extra-Distortion) Argument implies that, transaction-cost considerations aside, tax policy is a “more economically efficient” method of instantiating certain types of distributional norms than is an economically-inefficient legal-rule adjustment in the potentially-Pareto-superior sense of “more economically efficient.” Unfortunately, for reasons that the preceding paragraph articulated,\(^87\) although the Double-Distortion Argument does justify the conclusion that (transaction-cost considerations aside) tax policy is a “more-economically-efficient” tool for redistributing resources between or among income/wealth classes than are “economically-inefficient” legal-rule adjustments if “more-economically-efficient” and “economically-inefficient” are defined in their monetized senses, it does not establish the “greater economic efficiency” of the tax policy if “greater economic efficiency” is being defined in the potentially-Pareto-superior sense.

Admittedly, this possible KS error may not be important in itself. However, it is important indirectly because of its connection to one of the central themes of this critique of Kaplow and Shavell—namely, their insensitivity to the variety of and appeal of the distributional norms to which members of our society and other societies can and do legitimately subscribe.

Like anyone else, economists (including me) want their expertise to be very important. In part, this desire is manifest in a hope that the economic-efficiency conclusions that economists’ training does (or should) enable them to generate have great prescriptive-moral and legal relevance. Thus, economists would like the justness and moral-ought moral desirability of a choice to be completely determined by its economic efficiency. For many years, this understandable preference led economists to claim:

\(^86\) See KS 1994 at the last sentence of 668 and the first sentence of 669.

\(^87\) The preceding paragraph demonstrated that the greater economic efficiency of choice-option A over choice-option B in the potentially-Pareto-superior sense of “greater economic efficiency” is not a sufficient condition for A’s being “more economically efficient” than B in the monetized sense of that expression. Relatedly, because in our highly-Pareto-imperfect economy, any transfer policy that would otherwise be part of the relevant, hypothetical, Pareto-superior policy-combination might decrease economic efficiency in the monetized sense of that expression by decreasing the net economic efficiency in that sense of the choices made by its beneficiaries and victims by altering their income/wealth positions by more than the non-transfer component of the combination increased economic efficiency in the monetized sense of that expression, the potential-Pareto-superiority of a choice is also not a necessary condition for its being economically efficient in the monetized sense of that expression.
their expertise enabled them to determine the Pareto superiority or Pareto inferiority of any policy (enabled them to determine or at least to usefully assess the “economic efficiency” of any public or private choice in the Pareto-superior sense of “economic efficiency”); and

(2) that all Pareto-superior choices were morally desirable.

Increasingly, economists have had to acknowledge the obvious fact that the choices whose economic efficiency they were being asked to assess were neither Pareto superior nor Pareto inferior. Their response to this realization has been to claim that their expertise does enable them to determine whether a policy is potentially-Pareto-superior and that for some reason that they have failed to articulate (1) Pareto-superior choices are always morally preferable to their Pareto-inferior alternatives; and (2) that supposed fact implies that potentially-Pareto-superior choices are morally preferable to their potentially-Pareto-inferior alternatives. Although neither of those claims can bear scrutiny, I suspect that KS have mistakenly claimed that, with the qualifications they articulate, the Double-Distortion Argument establishes the economic-efficiency superiority of tax policies over economically-inefficient legal-rule adjustments in the potentially-Pareto-superior sense of “more-economically-efficient” because they think that this conclusion would justify their assertion that the Double-Distortion Argument’s economic-efficiency conclusion warrants the universal (though qualified) moral conclusion they claim to be able to derive from it.

I will now explain the erroneousness of both the assertion that the moral superiority of potentially-Pareto-superior choices follows from the moral superiority of Pareto-superior choices and the assertion that Pareto-superior choices are always desirable from any legitimate value-perspective. It should be obvious that—even if Pareto-superior choices were always desirable—a potentially-Pareto-superior choice might not be. Take, for example, a potentially-Pareto-superior non-transfer policy that was potentially-Pareto-superior because—in combination with a specifiable transfer—it would bring the economy to a Pareto-superior position. Assume ad arguendo that the Pareto-superior policy-combination was morally desirable. Clearly, if the moral desirability of the Pareto-superior policy-combination were critically affected by the moral desirability of its transfer-policy component, the fact that the non-transfer-policy component of the Pareto-superior policy-combination was potentially-Pareto-superior would be perfectly consistent with the moral undesirability of enacting the non-transfer policy in question on its own.

Equally seriously and perhaps more surprisingly, KS’ assertion that Pareto-superior choices will always be desirable from any prescriptive-moral normative perspective is also incorrect. Admittedly, Pareto-superior positions will always be more desirable than their Pareto-inferior counterparts from a utilitarian perspective. However, this conclusion does not im-
ply the moral superiority of Pareto-superior positions from all defensible normative perspectives. Take, for example, the options that would confront a prosecutor who had discovered a previously-undetected, forty-year-old instance of torture and murder and had identified and located the perpetrator. Assume:

1. the prosecutor was himself indifferent to whether he prosecuted the perpetrator;
2. the prosecutor could without cost keep secret a decision not to prosecute;
3. the perpetrator was himself no longer a risk to society—indeed, was now an economically-productive member of society who was well-loved by family-members and friends whom he nurtured in turn (that no specific-deterrence goals would be furthered by the prosecution);
4. the prosecution of this perpetrator would also disserve general-deterrence goals because the revelation that the crime in question had gone undetected for forty years would encourage more criminality than the prosecution would itself deter—indeed, the net effect of the prosecution would be to induce crimes to be committed without deterring any crime from being committed;
5. the prosecution of the perpetrator would not confer equivalent-dollar gains on the relatives, friends, and acquaintances of the victim because they were all dead;
6. the prosecution of the perpetrator would not confer net equivalent-dollar gains on members of the society who think that wrongdoers of this kind should be prosecuted, convicted, and punished because the equivalent-dollar loss they would sustain from the revelation that the crime had been undetected for 40 years would exceed the equivalent-dollar gain the belated prosecution, conviction, and punishment would confer on them; and
7. the various lawyers, legal staff, court personnel, police, prison personnel, etc. who would be given additional work by a prosecution would just break even by supplying it.

On these assumptions, the decision not to prosecute the relevant murderer would make some people (the perpetrator, his friends and family, quite possibly his employer and the consumers of his output, victims of the additional crimes that would be committed if he were prosecuted, and these potential victims’ friends, family, employers, and output-consumers) better off and no-one worse off. Although a decision not to prosecute the perpetrator would therefore be both Pareto superior and desirable from a utilitarian perspective, it would not be desirable from the perspective of various norms that value an individual’s rewards’ matching his moral desert. This
set of norms includes not only retributive norms but also some variants of libertarian norms.

As the text indicates, I doubt the empirical importance in the current context of the possibility that a Pareto-superior outcome may be less desirable from some normative perspectives than its Pareto-inferior alternative. I have discussed this possibility despite this fact because KS’ failure to recognize it manifests their general normative insensitivity, which has other manifestations that are far more practically significant.

IV. THE RELEVANCE OF DESERT NORMS TO ADJUDICATIVE AND LEGISLATIVE DECISIONMAKING AND THE SOUNDNESS OF KS’ Assertions AND CLAIMS THAT ALL “FAIRNESS NORMS” IN THEIR SENSE AND HENCE ALL “DESERT NORMS” IN THEIR SENSE MAY BE INCOHERENT AND CERTAINLY ARE INDEFENSIBLE

KS indicate up front that their “discussion concerns the overall distribution of income or wealth, not entitlement to payment based on desert.” As Part I.C indicated, although this conclusion is contestable, it seems most likely that KS intend the quoted statement in the preceding sentence to articulate the correct proposition that their argument and conclusions apply only when the distributional norm to be effectuated focuses exclusively on the shape of the distribution of earned income, earned plus unearned income, or total income and wealth and not on:

1. the absolute amount of money allocated to particular individuals, regardless of where that places them relative to others;
2. the relative position of particular individuals in such a distribution; or
3. the amounts of specific kinds of resources or opportunities that particular individuals secure (e.g., the amounts they obtain relative to some specific need they have).

Part III.A explains (1) why the adjudicators and legislators of a rights-based society may be obligated to effectuate justice-related “desert norms” in various contexts, assuming that these norms are coherent and defensible; and (2) why and when it will be morally permissible for the legislators of a right-based society to pass legislation to effectuate moral-ought-type desert norms and why if they do the adjudicators of the society in question will be obligated to apply such legislation. Part III.B delineates and criticizes the various assertions and arguments that KS have made to the effect that all

88 See KS 1994 at 667 n.8.
norms that belong in their category “fairness norms”—a category that includes all “KS desert norms”—may be incoherent and clearly are indefensible.

A. The Moral Desirability of the Legislators’ and Adjudicators’ of Rights-Based States Effectuating Desert Norms


The governments of rights-based societies have a prima facie moral obligation to secure all three types of entitlements listed in the above heading. In relation to the first two sets of these just-listed rights, this obligation requires the relevant governments inter alia to (1) prevent non-distributive-justice primary-right violations by their own agents, private institutions, and private individuals to the extent that the governments in question can do so without sacrificing their “subjects’” rights-related interests on balance; (2) to see to it that victims of such primary-right violations receive compensation for their losses (to the extent this is possible); and (3) (perhaps) to prevent for its own sake the relevant violators from profiting from their wrongs.

The governments of a rights-based State can discharge these duties:

(1) by educating the public to fulfill their primary/corrective-justice-related moral obligations;

(2) by creating common-law courts to enforce the corrective-justice moral right of repair of victims of rights-violations—i.e., by authorizing adjudicators in such courts to enforce the corrective-justice moral right of victims of private-moral-duty violations to recover their losses from their injurers by establishing that more probably than not their alleged injurers caused the victim’s loss by failing to fulfill their private moral duties;

(3) by passing legislation that enables such victims to secure compensation from wrongdoers in cases in which imperfections in the information on private-moral-duty violation and/or cause-in-fact available to adjudicators and/or problems caused by the concept of causation that is built into our notion of corrective justice, would preclude victims of wrongdoing from collecting damages from wrongdoers in a common-law suit (legislation that would deter tortious wrongdoing but might sometimes impose liability on injurers who were not at fault or could not be shown to have harmed any particular victim);
(4) by giving the private plaintiffs in the suits engendered by the two previously-listed types of legislation easy and inexpensive access to justice (e.g., by subsidizing legal fees, holding down court fees, reducing the delay-time of getting a trial and adjudicative decision, etc.), encouraging non-victims to supply evidence of private-moral-duty violations by offering rewards to corrective-justice whistleblowers and/or penalizing witnesses who refuse to supply evidence, and investigating possible corrective-justice-related wrongs itself and turning over relevant evidence to victims;

(5) by bringing civil or criminal suits against (imposing civil fines and/or criminal penalties) on those who have failed to fulfill their private-moral-duty obligations;

(6) by adopting various programs designed to make such wrongdoers feel guilty, to shame such wrongdoers, or to encourage or facilitate their being shunned by members of the public; and

(7) by securing compensation for victims of such wrongdoing by providing related social insurance or more general disability insurance, unemployment insurance, and welfare benefits.

The preceding discussion implies that the legislators of a rights-based State will be obligated to enact various pieces of legislation to secure the corrective-justice-related primary rights and the corrective-justice rights of those for whom they are responsible—i.e., to effectuate the related KS desert norms to which their society is committed. Part V.C will explain why the legislators of at least a liberal, rights-based State will not be able to discharge this responsibility without sacrificing economic efficiency.

The preceding discussion implies as well that adjudicators in rights-based States will also often be obligated to enforce the KS desert norms that underlie these two sets of rights regardless of the mix of common-law adjudication and legislation the legislators of the State in question use to fulfill the obligation they have to secure these rights. Obviously, Part V.C will also demonstrate that, at least in liberal, rights-based societies, adjudicators will sometimes not be able to discharge this responsibility without sacrificing economic efficiency.

The governments of rights-based societies are also obligated to secure the distributive-justice-related moral rights of those for whom they are responsible. The legislators of rights-based societies can discharge their distributive-justice responsibilities in various ways:

(1) by educating the public and all public officials about their society’s distributive-justice commitments;

(2) by passing legislation that assures that the society’s economic, formal-educational, familial, and other institutions will provide each moral-rights holder for whom their society is responsible with the general resources, specific resources, opportunities, and/or other sources of self-
respect to which its distributive-justice commitments assert these individuals are entitled;

(3) by passing legislation that provides directly for the government’s making up for any shortfall in the relevant distributive-justice-required outputs of the above private institutions;

(4) by establishing constitutional courts or other institutions that are authorized to evaluate “distributive-justice-shortfall” claims and either to supply any deficit themselves or order their society’s legislature of executive branches to supply it; and

(5) by establishing institutions to review the distributive-justice performance of their society, to recommend related legislation, and to expose and set in motion the sanctioning of public officials who have failed to fulfill their distributive-justice duties.

This discussion implies that legislators in a rights-based State will sometimes be obligated to pass legislation to effectuate its society’s distributive-justice-related KS-desert-norm commitments and that adjudicators in rights-based States will sometimes be obligated to effectuate such norms—i.e., to apply such legislation or to enforce the written or unwritten distributive-justice-related constitutional rights of the moral-rights holders for whom their society is responsible. Part V.A will demonstrate that—at least in a liberal, rights-based State—legislators and adjudicators will sometimes not be able to discharge these distributive-justice-related duties without sacrificing economic efficiency.

2. The Moral Permissibility of the Legislators’ of a Rights-Based Society Effectuating Various Types of Moral-Ought-Oriented Desert Norms and the Moral Obligation of Adjudicators in Such Societies to Apply Such Legislation

Corrective justice and distributive justice relate to the moral rights of those moral-rights holders for whom a rights-based State is responsible. Members of rights-based States can also have non-rights-oriented moral views about how individuals should treat each other, about how the government should treat its subjects, and about the resources and opportunities that particular individuals morally ought to have. It may be morally permissible for the legislators of a rights-based State to effectuate the personal ultimate values that underlie these views. Thus, so long as the rights-commitments of the society in question do not imply that a private actor or government official has a moral right to make a choice that some think he ought not make because of its effect on someone else, the legislature of such a State can prohibit the choice in question. Similarly, so long as the effectuation of the relevant private distributional value is not inconsistent
with the society’s fulfilling its distributive-justice commitments, it will be morally permissible for its legislature to pass legislation effectuating that value. Thus, it would be morally permissible for the legislature of a liberal, rights-based society to pass legislation that secured a more equal distribution of resources or utility than its liberal commitments required.

In any event, if it is morally permissible for the legislators of a rights-based society to pass such legislation, adjudicators in such a society would be morally obligated to apply the legislation in question. These conclusions are relevant to the empirical importance of KS’ desert-norm qualification because, as Part I.C indicated, many of the personal ultimate values in question are KS desert norms and because, as Part V.B will manifest, it will not be possible to effectuate some of these norms without sacrificing economic efficiency.

B. KS’ Assertions and Arguments About the Incoherence and Indefensibility of the Norms They Denominate “Fairness Norms”—A Category That Includes the Norms That I Am Calling “KS Desert Norms”

As I have already indicated, although KS admit up front that the Double-Distortion Argument has no bearing on the moral desirability of sacrificing economic efficiency to effectuate norms that relate to “entitlement based on desert”—i.e., to effectuate what I have been calling “KS desert norms,” they proceed somewhat puzzlingly to claim that the Double-Distortion Argument does imply the moral undesirability of common-law judges’ sacrificing economic efficiency to resolve common-law torts and contracts disputes. This claim is either inconsistent with their desert-norm qualification of their Double-Distortion-Argument argument’s conclusion or reflects their subscription to one or more of the following positions:

1. that the societies whose possible adjudicatory decisions they are analyzing are neither rights-based societies nor goal-based societies that are committed (perhaps inter alia) to a KS desert norm that has implications for the moral-ought desirability of choices covered by the common law;
2. that societies that are committed to KS desert norms that apply to the resolution of tort and contract disputes are not bound to obligate the adjudicators of any common-law courts they establish to resolve such disputes to decide them in a way that is consistent with the desert norms in question;

89 Id.
90 See id. at 669-74.
91 See id. at 674.
(3) that (quite reasonably) the desert-norm qualification in question is limited to coherent, defensible desert norms and that no KS desert norms are both coherent and defensible; and/or

(4) that one will be able to effectuate any KS desert norm that is coherent and defensible without sacrificing economic efficiency.\footnote{Certainly, many economists have asserted and/or made arguments that purport to establish the position that a choice's being economically efficient is a necessary and sufficient condition for its being just or morally desirable, justice considerations aside. For a discussion of the relevant literature, see Markovits, supra note 28, at 28-34 and 36-40.}

I do not know whether KS subscribe to the first, second, and/or fourth positions just delineated. However, the combination of (1) the fact that all norms that they describe as “fairness norms” in their “fairness” versus “welfare” scholarship\footnote{See KS 2001.} are also “desert norms” in the sense in which their relevant comments in their “Double-Distortion Argument” articles imply they would understand this expression and (2) their comments on the coherence and defensibility of “fairness norms” in their “fairness” versus “welfare” scholarship makes it clear that they subscribe to the third position listed above.

In their “fairness” versus “welfare” scholarship, KS make eight arguments against what they call “fairness norms”\footnote{See id. at 1005-19.}—i.e., norms that do not focus exclusively on total utility and/or the shape of the distribution of utility. In particular, KS argue that such norms:

(1) are ungrounded in the sense that their attractiveness has never been explained;
(2) are always or virtually-always ill-specified;
(3) may be inherently incoherent;
(4) are horizontally inequitable in practice;
(5) are ill-designed to achieve their (supposed) goals, regardless of whether those goals are to deter wrongdoing for its own sake or to secure various other sorts of results;
(6) are sometimes perverse in their effects in that they sometimes exacerbate the problems they were (allegedly) designed to reduce or eliminate;
(7) sometimes disfavor choices that would maximize utility (welfare); and
(8) in each exemplification will in at least some circumstances disfavor Pareto-superior choices (choices that make someone better off and no-one worse off).
I will briefly address each of these claims.

KS claim that “little explicit justification for notions of fairness . . . has in fact been offered.” I have four responses. First, since I am not a Foundationalist, I will admit that, as an ultimate matter, the objective superiority of a moral norm cannot be established. For example, I admit that one cannot demonstrate that the thing that I claim our society is committed to valuing—creatures’ leading lives of moral integrity—is more morally valuable than anything else. Second, KS’ normative discussions lead me to suspect that their conclusion that no proponent of any particular fairness norm has adequately explained its attractiveness may derive from their belief that the only kind of justification that can be justified is what they denominate a welfarist justification—i.e., a justification that focuses exclusively on total utility and/or the shape of the distribution of utility. Obviously, this kind of intellectual boot-strapping would involve an unacceptable type of circularity. Third, KS fail to recognize that their “inadequate justification” complaint is decidedly double-edged: as an ultimate matter, KS cannot demonstrate that creatures’ experiencing utility is important, much less more important than anything else. Fourth, as Part I.C argues, even if as an ultimate matter no moral norm can be demonstrated to be superior to all others, one might be able to determine the moral norm to whose effectuation a given society is committed.

KS’ second objection to “fairness” discourse is that the proponents of particular “fairness” or “corrective justice” norms have failed to specify them appropriately—a deficiency that cannot be overcome by reference to the relevant norm’s justification since (in KS’ view) “little explicit justification has been offered” for any such norm. I have three responses to this complaint. First, I suspect that it partially reflects KS’ belief that any term that cannot be mechanically interpreted has no denotation. Second, although two wrongs do not make a right, people who live in glass houses should not throw stones. Scholars who advocate the use of a decision-criterion that requires all human psychic experiences (e.g., ecstasy, satisfaction, pleasure, displeasure, disease, aggravation, pain, anxiety, fear, horror, etc.) to be converted into units of utility or welfare without indicating in any way how this conversion can be managed should hesitate to accuse

95 Id. at 1018.

96 I should note that although I have examined the implications of a commitment to valuing “leading lives of moral integrity” for the attributes that a creature must have to count in prescriptive-moral analysis, see MATTERS OF PRINCIPLE at 35-39, KS have never addressed the implications of “welfarism” for the correct resolution of this boundary-condition issue.

97 See KS 2001 at 1005-06.

98 See id. at 1018.
proponents of “fairness norms” of inadequate precision. Third, Part V of this Essay attempts to respond to this objection constructively by operationalizing the liberal justice norm to which I think our society is committed and a variant of the libertarian distributive-justice norm that might qualify as a “moral norm.”

KS appear to be uncertain about their third objection to fairness norms—viz., that such norms are inherently incoherent.99 The three responses I made to KS’ second objection also apply to this third objection.

KS’ fourth objection to at least some fairness norms is that they ignore horizontal equity—for example, they ignore the facts that “most instances of negligence do not cause accidents” and that “for many types of crime, most criminals are not caught.”100 I have two responses to this criticism. First, KS’ welfarism also pays scant attention to horizontal inequities—it disvalues them only to the extent that they cause those creatures who count to experience disutility because of their preference for horizontal equity. Second, from the perspective of many justice norms, horizontal-inequity considerations may be either irrelevant or relevant but not critical. Thus, from a liberal perspective, the attractiveness of requiring a culpable injurer to compensate his victims if the alternative were for the victims to be uncompensated would not be affected by the fact that other culpable actors were morally lucky in that their culpable act harmed no one.101 Similarly, a retributionist or a subscriber to any other value that leads to the conclusion that the resources an individual receives (broadly understood) should be determined by the moral quality of his conduct might well conclude that the fact that many criminals are not caught does not defeat the case for punishing those who are. In this case, the second-best and third-best conclusions may well be the same as the first-best conclusion.

KS’ fifth objection to fairness norms is that they are insufficiently forward-looking—i.e., “reflect an ex post perspective”102—and as a result disserve their (alleged) goal of minimizing wrongdoing103 or inducing beneficial behavior.104 I have two responses. The first is admittedly just an asser-

99 KS’ uncertainty is manifest in the following statement: “Although in principle . . . [the previously-specified] deficiencies concerning meaning and scope might be remedied, they generally have not been, and we are left with considerable uncertainty about what fairness-based analysis actually entails, even in basic settings.” See id. at 1006. Note the use of the word “might.”
100 See id. at 1007.
101 Admittedly, if the commission of harmless wrongful acts were sufficiently widespread and difficult or transaction-costly to detect, a liberal might be obligated to conclude that a system of social tort insurance is morally superior to a corrective-justice system in which wrongdoers are required to compensate their victims.
102 See id. at 1007.
103 See id. at 1006.
104 See id. at 1008.
KS create the impression that the implementation of the norms they
denominate “fairness norms” will produce these effects far more often than
such norms will. Second, the “point” of some fairness norms may not be to
achieve the forward-looking consequences on which KS are focusing.
There is no objective basis for concluding that securing those consequences
is more important than (say) punishing wrongdoers for its own sake. Once
more, KS are simply privileging the effects that they value over other ef-
fects that would be more important from some perspectives that deserve to
be called “moral.”

KS’ sixth objection to fairness norms is the related objection that the
implementation of some fairness notions sometimes produces perverse ef-
fects from the perspective of the goals that appear to underlie them. Thus,
they argue:

In some basic settings, the only effect of choosing punishment in accordance with retribu-
tive justice (aside from raising the cost of the legal system and increasing the number of in-
ocent victims of crime) is to preserve the profitability of crime to some potential crimi-
nals—who themselves are viewed as wrongdoers according to retributiv e theory. Or, pursu-
ing the principle of corrective justice, under which wrongdoers must compensate victims for
harm done independently of whether requiring such payments reduces individuals’ well-
being, has as its only other feature that in certain settings it favors some types of individuals
over others solely on characteristics determined by chance elements that seem morally arbi-
trary from any plausible perspective.¹⁰⁵

The two responses I made to KS’ fifth objection also apply to their
sixth.

KS’ seventh objection to fairness norms is the related objection that
their implementation sometimes sacrifices “well-being.”¹⁰⁶ I have three
responses to this claim. First, it implicitly measures “well-being” by utility—an arbitrary choice since well-being could equally well be measured
according, for example, to the extent to which the relevant individuals lead
lives of moral integrity. Second, again an assertion, KS create the impres-
sion that the implementation of the norms they denominate “fairness
norms” would sacrifice utility (however that is measured) far more often
than it would. And third, beauty is symmetry. If the securing of justice re-
quires the sacrifice of utility or some other maximand in which the shape of
the distribution of utility perhaps as well as total utility are arguments, the
maximization of utility or the securing of some exclusively-utility-oriented
maximand will require the sacrifice of justice. From an ultimate perspec-

¹⁰⁵ Id. at 1018-19.
¹⁰⁶ See id. at 1011.
tive, this reality provides no basis for choosing between fairness and welfare.107

KS’ eighth, again related, and final objection to fairness notions is that any “fairness-based analysis . . . [will inevitably in some cases lead] to the choice of legal rules that reduce the well-being of every individual.”108 KS believe that the fact that consistently adhering to any notion of fairness will sometimes entail rejecting a Pareto-superior choice demonstrates the undesirability of any such norm:

[I]f one adheres to the view that it cannot be normatively good to make everyone worse off, then logical consistency requires that one can give no weight in normative analysis to notions of fairness because doing so entails the contrary proposition . . . .109

I have two objections to this argument. First, its conclusion does not follow from its premise: as Howard Chang has pointed out, even if Pareto-inferior positions were always morally inferior to their Pareto-superior alternatives, a decision-protocol that instructs the decision maker to pick the Pareto-superior option if one is available but—if no such option is available—to use an evaluative protocol in which a “fairness norm” either determines the outcome by itself or plays a positive but less dominant role in the determination of the relevant decision might be morally attractive.110 Second, KS’ Pareto-superior-position-related argument must be rejected because its premise is wrong: from some normative perspectives that deserve to be called moral, a Pareto-superior option may be morally inferior to its Pareto-inferior alternative.111

In short, I am not convinced either by the assertions or by the arguments that KS make in their “fairness” versus “welfare” scholarship to the effect that all “fairness norms” (and by implication all KS desert norms) may be incoherent and certainly are indefensible. Inter alia, Part V will confirm this subpart’s conclusion that KS’ coherence concerns are unjustified by giving what I hope will be coherent accounts of the substance of three KS desert norms that are often cited in discussions of distributive

107 Moreover, as Part I.B indicated, in my judgment, a careful study of our society’s prescriptive-moral discourse and conduct would lead to the conclusion that we are committed to choosing justice (fairness) over welfare (utility) when the two favor different conclusions.
108 Id. at 1012.
111 See, e.g., the example at the end of Part III of this Essay.
justice or the primary rights whose violation gives rise to corrective-justice rights in our society.

V. **The Substance and Coherence of Three KS Desert Norms That Are Often Cited in Prescriptive-Moral Discussions in Our Society and the Reasons Why It Will Sometimes Not Be Possible to Effectuate Them Without Sacrificing Economic Efficiency**

Part V has three subparts, each of which addresses a KS desert norm that plays an important role in contemporary prescriptive-moral discourse in our society. Each delineates the substance of the KS desert norm in question in some detail and explains why it will not be possible to effectuate that norm in particular circumstances without sacrificing economic efficiency. The three KS desert norms in question are (1) the liberal distributive-justice desert norm, (2) a variant of the libertarian distributional moral-ought norm that may qualify as a moral norm and (if it does) could be legitimately effectuated in our society when its effectuation would not violate our society’s liberal distributive-justice commitment, and (3) a liberal non-distributive-justice moral-duty-determining desert norm (whose possible violation is the object of corrective-justice duties).

A. **The Liberal Distributive-Justice KS Desert Norm**

In **Matters of Principle**, I gave the following account of the somewhat-concrete corollaries of the distributive-justice obligation of a liberal, rights-based State—an account that gave primary emphasis to such a State’s obligation to show appropriate, equal concern for all the moral-rights holders’ for whom it is responsible by putting them in a position to actualize their potential to lead lives of moral integrity:

At a minimum, this duty implies that a liberal State is obligated to guarantee that each of its subjects obtains the police protection, nutrition, clothing, shelter, and medical services she requires to survive (so long as the State can provide such resources without sacrificing more weighty rights-related interests of others and perhaps so long as the subject in question has not voluntarily created her need for such assistance). In addition, the principle implies that a liberal State is obligated to guarantee that each of its subjects receives any additional nutrition, shelter, clothing, and medical care that may critically affect whether she can actualize her potential to take her life morally seriously. At least arguably, individuals who are struggling to obtain the resources necessary for them or their loved ones to survive (e.g., who are starving or homeless) or individuals who can survive only by living a life of constant drudgery are not really in a position to make meaningful life-choices. Furthermore, this duty of appropriate, equal concern implies that a liberal State is obligated to take appropriate steps to insure that each moral-rights holder has the kind of parental services, more general psychological support, and (in our materialist society) material resources (perhaps the relevant figure is the higher of some absolute minimum and some specified share of the average material
income in our society) that favors a person’s developing the kind of self-respect and self-confidence that contributes to his being able to make meaningful life-choices. In addition, this duty obligates a liberal State to provide each moral-rights holder with the formal knowledge, exposure to a variety of life-choices, intellectual skills, understanding of the value of being the author of one’s own life, privacy, and opportunities to enter into, develop, and maintain intimate relationships that contribute to their participants’ abilities to make meaningful life-choices. Finally, the duty also implies that a liberal State is obligated to combat the efforts of parents, friends, and others to coerce or unacceptably pressure individuals into making particular life-choices.112

I recognize both that this account of the concrete corollaries of the liberal distributive-justice norm is contestable and that different, knowledgeable, skilled, and assiduous interpreters could reach different conclusions about its implications for the resolution of specific social issues. Nevertheless, I do think that this account is sufficiently operational to establish the coherence of the liberal distributive-justice norm.

For evaluating the importance of KS’ desert-norm qualification to their Double-Distortion-Argument argument’s conclusions, it is important to analyze whether one would have to sacrifice economic efficiency to effectuate the liberal distributive-justice desert norm. Before explaining why one sometimes would have to sacrifice economic efficiency to effectuate this norm, I will have to address and resolve an ambiguity or gap in the conventional definition of economic efficiency.

The relevant definitional gap relates to the measurement of the equivalent-dollar effects of a public choice on (1) an individual who is not able to have or understand much less express his preferences or values ex ante (e.g., say, an infant); or (2) an individual whose preferences or values are changed by the public choice in question. This issue is relevant to the economic efficiency of implementing the liberal distributive-justice norm for two reasons: first, because that norm relates to the treatment not just of fully functioning adults but also of fetuses, newborns, infants, children, and

112 MATTERS OF PRINCIPLE at 42-43. I recognize that our society has done a far from perfect job of fulfilling what I have claimed is its commitment to this liberal distributive-justice norm. I also recognize that this non-fit counts against my claim that our society is a liberal, rights-based society. I persist with that claim nevertheless (1) because I think that our society has done an increasingly good job of living up to this commitment through time, (2) because the relevant non-fit can at least in part be explained (though the explanation focuses in part on American racism—see William E. Forbath, Caste, Class, and Equal Citizenship, 98 MICH. L. REV. 1 (1999)—which itself is a violation of our society’s commitment to showing all moral-rights holders for which it is responsible appropriate, equal respect and concern), (3) because despite this non-fit, I still think that the variant of liberalism to which I claim our society is committed fits the relevant data better than any alternative does, and (4) because I think that the discounted fit of liberalism is sufficiently good to warrant the conclusion that our society is a liberal, rights-based society of middling or perhaps minimally-acceptable moral integrity rather than an amoral society or an immoral society. I hasten to emphasize that my critique of KS’ Double-Distortion-Argument argument does not critically depend on the accuracy of my claim that ours is a liberal, rights-based society.
adults who have the neurological prerequisites to lead lives of moral integrity but suffer from various relevant disabilities and, second, because many of the public choices the norm favors or requires are designed to influence the kind of person the individuals they affect become and concomitantly what these individuals prefer or value—in particular, they are designed to make the individuals they affect become or value becoming persons of moral integrity.

This fact certainly complicates and may render indeterminate the definition of “impact on economic efficiency.” To see why, consider the example of a public choice that converts an irresponsible, happy-go-lucky person of no integrity into a person of moral integrity. From the happy-go-lucky person’s perspective, that choice may have imposed an equivalent-dollar loss on him by making him less happy. Indeed, even the person of moral integrity the choice caused him to become might admit that he would have been happier had he been left to his own devices. I should add that there would be no inconsistency in a person of moral integrity who had announced this conclusion contemporaneously both (1) declaring that he would not prefer to revert to his former, happy-go-lucky, oblivious state and (2) placing a positive equivalent-dollar value on the public choice that (in effect) converted him into a serious moral person. Should the public choice in question be said to have imposed an equivalent-dollar loss or to have conferred an equivalent-dollar gain on the person in question (if that person’s economic or moral identity is assumed not to have been changed by the choice whose economic efficiency is under consideration)?

Unfortunately, I see no way to resolve this issue from a “purely economic” perspective. In what follows, I will assume that the relevant economic-efficiency effect should be valued from the changed person’s (ex post) perspective. I make this assumption solely because it is an “assumption against interest” in that it favors the KS position I challenge by making it more likely that the choices that the liberal, distributive-justice desert norm commends will increase “economic efficiency” as defined.

However, even if the economic efficiency of effectuating the liberal distributive-justice desert norm is defined in this way, the effectuation of this norm may not be economically efficient. This conclusion is warranted by the following facts:

(1) providing each moral-rights holder with the various resources and opportunities to which the liberal distributive-justice norm states he is entitled will always be very allocatively costly and will sometimes be extremely allocatively costly (think of Helen Keller);

(2) some recipients of a liberal education may place a negative or low-positive equivalent-dollar value on that experience because they found such an educational experience unpleasant in itself, believe that the person they would have become had they not received the relevant education
would have been happier than the person those experiences caused them to become, place a high equivalent-dollar value on pleasure, and place a low equivalent-dollar value on leading a life of moral integrity;

(3) the resource-transfer the liberal distributive-justice norm required might not increase the difference between the conventional allocative product and allocative cost of the relevant recipients’ labor and would reduce the net allocative-product gain generated by the labor of the potential payors of the taxes that would be levied to finance the relevant resource-transfer; and

(4) in those cases in which an analysis of the economic efficiency of implementing the liberal, distributive-justice norm that focused only on the first three effects just discussed would yield the conclusion that it would be economically inefficient, the associated economic-efficiency loss might not be fully offset by the norm-implementation’s tendency to increase economic efficiency (A) by deterring its beneficiaries from generating external costs and inducing them to generate external benefits (when making both conventional economic and conventionally non-economic decisions) by increasing the extent to which they are persons of moral integrity and (B) by satisfying the external preferences of the members of a liberal, rights-based society for their society’s fulfilling its liberal commitments and for others’ leading lives of moral integrity.

Indeed, even if the implementation of the liberal distributive-justice norm would increase economic efficiency across all cases,\textsuperscript{114} it might not do so in certain identifiable cases—for example, when the potential recipient of resources was mentally or physically handicapped in ways that would not preclude him from becoming an individual of moral integrity but would increase the allocative cost of enabling him to function in this way and decrease the conventional allocative-product gain of doing so.

\textsuperscript{114} Obviously, it would depend \textit{inter alia} on the pre-implementation distribution of income/wealth and opportunities in the society in question. I have no doubt that the contemporaneous implementation of the liberal distributive-justice norm in our society would increase economic efficiency because it seems clear to me that, from the perspective of economic efficiency, we currently massively underinvest in the nutritional resources, housing resources, medical resources, and educational resources we devote to the children of the poor. However, it is far from clear that the implementation of the liberal distributive-justice norm would increase economic efficiency across all cases in a society whose investment in its children is already economically efficient.
B. Two Variants of the Libertarian Distributional Norm\textsuperscript{115} That Might Qualify as Moral Norms\textsuperscript{116}

This subpart delineates two libertarian-type distributional norms that might deserve to be called moral norms and analyzes the economic-efficiency consequences of instantiating them. The first such norm asserts that each individual should\textsuperscript{117} receive “what he produced” in the “marginal allocative product” (MLP) sense of that expression. The second such norm asserts that each individual should receive the same, appropriate proportion\textsuperscript{118} of “what he produced” in the “average allocative product” (“ALP”).

\textsuperscript{115} Some libertarians subscribe to a distributional evaluative-standard that warrants each person’s retaining those resources he received without his or anyone else’s directly violating anyone else’s rights. Since this norm asserts that individuals morally-ought to be allowed to keep or have a moral rights to keep resources they obtained by luck—i.e., resources that (1) they obtained in ways that did not involve their or any benefactor of theirs making choices for which the actor in question can claim moral credit and (2) they (presumably) did not need to actualize their potential to lead lives of moral integrity. I believe that this portion of the libertarian distributitional evaluative-standard cannot be morally justified. See contra ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

\textsuperscript{116} The subheading states that the two relevant libertarian distributional standards might qualify as moral norms. Because I suspect that differences in the marginal and average allocative products of different individuals primarily reflect things other than choices they made for which they are morally responsible—for example, (1) their genetic endowment, (2) the nutrition their mothers consumed when they were in utero, (3) the physical and emotional condition of their mothers when the individuals were in utero, (4) the nutritional, housing, and medical resources they received while growing up, (5) the quality and quantity of the parenting services they received, (6) the formal-education resources that were allocated to them, (7) the character of the neighborhoods in which they grew up, (8) fortuities of accident and illness, and (9) various sets of factors that affect the marginal and average allocative product of the type of labor they perform—(A) the goods/services preferences of other members of their society and its income/wealth distribution both of which affect the allocative value of successive units of what they produce and thereby the marginal and average allocative product of the members of their labor class, (B) the number of others who can perform the labor services they can perform, the market value of the other services these labor-competitors can perform, and the dollar value these others place on leisure all of which affect the supply curve of the type of labor they perform, hence the quantity of the type of labor they can perform that is performed, and thereby the average and marginal allocative products of the members of their labor class, and (C) the availability and allocative and private cost of (i) the labor services that are complementary to the services they can render and (ii) the goods or services that are complementary to the final goods or services they can produce, which affect the average and marginal allocative products of the members of their labor class both by affecting the allocative value of successive units of the good they produce and by affecting the amount of the type of labor that they can supply that is performed.

\textsuperscript{117} This subpart continues to use the word “should” to refer both to “morally-ought to” and to “have a moral right to.” In the current context, this usage reflects the fact that some libertarians consider the libertarian norm to which they subscribe to be a personal ultimate value in my sense of this expression and some consider it to be a moral principle in my sense.

\textsuperscript{118} Proponents of the ALP-oriented distributional norm probably do not favor each worker’s receiving 100% of the average allocative product of his labor class because such payments would leave
sense of that expression. I will now elaborate on those two distributional standards sufficiently to establish their coherence, explain the basis of the possible moral appeal of the MLP standard, and demonstrate that it will often not be possible to instantiate either of these standards without sacrificing economic efficiency.

Obviously, these MLP-oriented and ALP-oriented distributional norms will be coherent if and only if the concepts MLP and ALP are coherent. In this context, the marginal allocative product of the members of a given class of workers—defined by the type of labor they perform and the skill and assiduity with which they perform it—is the allocative product of the last equally-skilled and equally-industrious worker to perform the type of labor in question. The marginal allocative product of such a worker equals the equivalent-dollar value to their consumers of the extra goods and services that are produced because of his efforts plus any external benefits generated by his production of and the consumption of these goods and services minus any external costs generated by his production of these goods and services and their consumption. By way of contrast, the average allocative product of the members of the relevant labor class equals the allocative value of the goods and services they produced—their equivalent-dollar value to their consumers plus the external benefits minus the external costs generated by their consumption plus the external benefits minus the external costs his production of them generated—divided by the number of workers in the relevant labor class.

In the current context, it is important to emphasize that the distribution of income that the MLP-oriented distributional norm favors will usually be quite different from the distribution that the ALP-oriented distributional norm favors. For two labor classes (LCI and LCII), MLPLCI/MLPLCII will often be very different from ALP LCI/ALP LCI. Indeed, because MLP LCI may well exceed MLP LCII when ALP LCII exceeds ALP LCI, the MLP-oriented desert norm may well favor the members’ of LCI being paid more than the nothing over for the suppliers of land and capital, whom those evaluators almost certainly would think also deserve to be rewarded for their supply-efforts. I assume, therefore, that libertarians who subscribe to the ALP-oriented distributional norm will support each worker’s receiving that proportion of his labor-class’s ALP that will leave enough of that product undistributed to permit appropriate rewards to be given to suppliers of land and capital.

119 Although I am unaware of any libertarian’s addressing this issue explicitly, I suspect that most libertarians who subscribe to either of the allocative-product-oriented distributional norms would also favor the resources’ at each individual’s disposal reflecting the externalities of consumption he generated or would generate if he consumed them. I will ignore this complication in the text that follows.

120 This somewhat awkward formulation reflects the fact that the relevant worker’s marginal physical product may not equal the number of units of the relevant product or service he personally produced if his labor increased and/or decreased the physical outputs of one or more of his co-workers.
members of LCII when the ALP-oriented desert norm favors the members of LCII being paid more than the members of LCI.

I will begin my explanation of this possibility by explaining why the MLP of any class of labor will differ from its ALP. For two reasons, the marginal allocative product of the last worker in a given labor class will generally be lower than the average allocative product of the workers in that class. First, the marginal physical product of labor—the extra physical product that is produced as a result of the efforts of successive, equally-skilled, and equally-industrious workers—declines because each additional worker reduces the average amount of capital combined with the efforts of each worker in the relevant class. Second, the allocative value of the successive units of the good or service the relevant class of workers produces declines. Roughly speaking, these relationships imply, for example, that if the rate at which the marginal physical product of successive workers in LCI declines is greater than the rate at which the marginal physical product of successive workers in LCII declines and/or the rate at which the marginal allocative value of successive units of the good or service workers in LCI produce declines is greater than the rate at which the marginal allocative value of successive units of the good or service that workers in LCII produce declines, MLP<sub>LCI</sub>/MLP<sub>LCII</sub> will be lower than MLP<sub>LCP</sub>/ALP<sub>LCII</sub> so that MLP<sub>LCI</sub>/MLP<sub>LCII</sub> will be lower than ALP<sub>LCI</sub>/ALP<sub>LCII</sub>. Indeed, on this account, MLP<sub>LCI</sub> may be lower than MLP<sub>LCII</sub> while ALP<sub>LCI</sub> is higher than ALP<sub>LCII</sub>.

I hasten to assert my admittedly contestable suspicion that even the latter possibility is empirically important. For example, because I suspect that the marginal allocative value of successive units of the services supplied by sanitation workers drops more quickly than does the marginal allocative value of successive units of the services supplied by doctors, I would not be surprised if the ALP of sanitation workers were higher than the ALP of doctors<sup>121</sup> although the MLP of doctors is higher than the MLP of sanitation workers.

Now that I have explained the substance of the MLP-oriented norm and the ALP-oriented distributional norm and why the difference between them is important, I will comment briefly on their moral appeal. I have already noted my premise that, to merit the designation moral norm, a distributional norm must express a conception of desert that links the desirability of someone’s receiving a resource or being given an opportunity either to some choice that he or a benefactor has made for which the chooser in question deserves moral credit or to his having the potential to lead a life of moral integrity. As already noted, on this account, I doubt that the libertar-
ian norm that individuals should be allowed to retain all resources they secured in ways that cannot be linked to their or anyone else’s directly violating another person’s moral rights is a moral distributional norm. More specifically, I have doubts on this score inter alia because that norm asserts that people should be allowed to retain resources they secured through luck, for which they deserve no moral credit. I have also already noted my related doubts about the moral status of the MLP-oriented and ALP-oriented distributional norms. These doubts arise due to my empirical belief that, by and large, interpersonal differences in MLPs or in ALPs reflect factors over which the individuals have no control—differences in individual capacities or social realities for which the relevant individuals deserve no or little moral credit. I have doubts about these two libertarian norms as well because they focus exclusively on income-earners—i.e., because they ignore the position of the children of potential suppliers of labor, land, and capital. However, I do think that the MLP-oriented and ALP-oriented distributional norms have more moral resonance than the two private counterparts to them to which some members of our society seem to subscribe: in the case of workers who function by increasing their employers’ unit outputs, the norms that favor each such worker’s being paid respectively (1) the marginal revenue product of the last member of his labor class—the last member’s marginal physical product times the average amount of marginal revenue his employer obtained on the additional units of the relevant product the relevant last worker’s labor enabled his employer to produce (as contrasted with the average allocative value of those units)—or (2) the same, appropriate proportion of the average revenue product of the members of his labor class—the average physical product of the members of his labor class times the average revenue their employer obtained on the units of output these workers produced. In particular, these revenue-product distributional norms are “less moral” than their allocative-product counterparts because the revenue-product distributional standards claim that the wages individuals receive should depend on a variety of factors over which the relevant individuals have no control and for which they deserve no moral credit or discredit—e.g., the extent to which their employers face price competition, whether the demand curve for the product or service they produce is linear, convex to the origin, or concave to the origin, and the various factors that influence the ability of their employer to profit by converting what would otherwise be buyer surplus into seller surplus by charging

122 See supra note 116.

123 I write “seem” because it is not clear that the relevant individuals recognize the differences (1) between the MLP and marginal revenue product and (2) between ALP and average revenue product.
differentiated or discriminatory unit prices or lump-sum fees and/or by employing tie-ins or reciprocity agreements.¹²⁴

In any event, it seems to me that the moral premise on which libertarians operate—viz., that, for moral purposes, each person is an island (individuals have no positive responsibility to each other)—implies that they should find the MLP-oriented distributional norm we have been discussing more attractive than the ALP-oriented variant since the effectuation of the MLP-oriented variant will give each worker resources equal in value to the allocative value of the extra units of the good he produced that his efforts made available to others. I should report anecdotally that my conversations with self-styled libertarians about their preference between the MLP-oriented and ALP-oriented distributional norm have yielded inconsistent conclusions. If they are informed solely of the abstract conceptual difference between the ALP-oriented and MLP-oriented variants, most state that they subscribe to the ALP-oriented distributional norm. However, if they are told in addition that the ALP-oriented norm but not the MLP-oriented norm may favor sanitation workers’ being paid more than doctors, they change their minds and opt for the MLP-oriented variant.

The final issue that is relevant in the current context is the economic-efficiency consequences of instantiating the MLP-oriented and ALP-oriented distributional norms respectively. I begin by focusing on the MLP-oriented distributional norm.

Four points need to be made in relation to the economic efficiency of instantiating this norm. First, a standard economic theoretical proposition: in a market economy, each worker will be paid the marginal allocative product of the last worker in his labor class if either:

1. all Pareto-optimal conditions are fulfilled and the average allocative product that each worker generates over all his labor-time equals the marginal allocative product that his last unit of labor-time generates; or
2. the relevant departures from the various Pareto-optimal conditions and divergence between the last worker’s marginal and average allocative products (for his marginal and average unit of time devoted to labor) offset each other perfectly.

Second, two empirical propositions that I believe are uncontestable:

¹²⁴ For a detailed analysis that implicitly reveals how all such factors will affect the relevant marginal and average revenue products, see Richard S. Markovits, Tie-Ins and Reciprocity: A Functional, Legal (Competitive Impact), and Policy Analysis, 58 Tex. L. Rev. 1363 (1978) and Richard S. Markovits, Tie-Ins, Reciprocity, and the Leverage Theory (the Non-Leverage Functions of Tying Agreements), 76 Yale L.J. 1397 (1967).
(1) our economy contains an extraordinarily high number of Pareto imperfections of each type;\textsuperscript{125} and

(2) there is absolutely no reason to believe that the extant Pareto imperfections or the combination of those imperfections and any divergences between the individual laborer’s average and marginal allocative products will perfectly offset each other in relation to the MLP-oriented \textit{desideratum}.

Third, a non-controversial proposition about the sorts of policies one could adopt to effectuate the MLP-oriented distributional norm in a world that contains Pareto imperfections and may contain relevant individual-worker MLP-ALP differences—in such a world, one can effectuate the MLP-oriented distributional norm:

(1) directly through government-transfer policies that do not involve taxes on the margin of income; and/or

(2) indirectly through antitrust, regulated-industries, environmental-protection, tax-on-the-margin-of-income, and/or consumer-protection policies that are designed to improve the extent to which the surviving Pareto imperfections offset each other in relation to the distributional goal of equating each worker’s net wage with the allocative product of the last member of his labor class.

Fourth, a crude economic-efficiency assessment that I also do not think is controversial: although all of the individual government interventions that would help to effectuate the MLP-oriented distributional norm would tend to reduce labor/leisure and various related misallocations, some if not many or most would decrease economic efficiency on balance because the sum of (1)(A) the allocative transaction costs that would have to be generated to design and execute them and (B) various other economic-efficiency losses their execution would yield (e.g., sacrifices in the extent to which production is organized in ways that take advantage of economies of scale or economies that relate to productive inputs’ being complementary for non-scale reasons) would exceed the sum of (2)(A) any labor/leisure economic-efficiency gains their execution generated and (B) their tendency to satisfy on balance the “external distributional preferences” of the members of the relevant society—in particular, of those who subscribe to the MLP-oriented distributional norm.

Four points also can be made in relation to the economic efficiency of instantiating the ALP-oriented distributional norm (though the following exposition is in one sense unnecessarily circuitous). First, because

\textsuperscript{125} See supra note 9.
MLP_{LCL}/MLP_{LCII} will equal ALP_{LCL}/ALP_{LCII} only rarely and fortuitously and because even when these two ratios are equal, the relevant ALP-oriented norm’s subscribers may not think that \((MLP_{LCL}/ALP_{LCL})=(MLP_{LCII}/ALP_{LCII})\) is the appropriate proportion for workers to be paid of their labor class’s ALPs, the ALP-oriented distributional norm would not be instantiated by a market economy even if it were Pareto perfect and the relevant last workers’ MLPs equaled their respective individual ALPs. Second, in a world in which neither of the above two conditions is fulfilled, there is certainly no reason to believe that—without government interventions specifically designed to achieve this result—workers’ net wages will equal the appropriate proportion of their respective labor classes’ ALPs. Third, once more, government could intervene to instantiate the ALP-oriented distributional norm in question through transfer policies that do not involve taxes on the margin of income or by intervening in various other ways to increase the extent to which the surviving Pareto imperfections offset each other in relation to their impact on the ALP-oriented distributional goal. And fourth, since the instantiation of the ALP-oriented distributional goal will make less of a contribution to labor/leisure-choice economic efficiency (indeed, may actually cause such efficiency to drop), it is even more likely that individual efforts to instantiate this distributional norm would decrease economic efficiency or that the net effect of all such attempts would be to decrease economic efficiency on balance.

C. The Non-Distributive-Justice/Primary-Tort-Right-Related Corollary of the Basic Liberal Commitment

I have already explained and argued for the following five propositions:

(1) an appropriate “empirical” investigation of our society’s prescriptive-moral discourse and conduct would justify the conclusion that ours is a liberal, rights-based society—i.e., a society that is committed to instantiating the right of each moral-rights holder for whom it is responsible to be treated with equal, appropriate respect and concern where the concern relates primarily to the relevant individuals’ actualizing their morally-defining potential to lead lives of moral integrity;

(2) this commitment implies inter alia that our society is obligated to secure what I am denominating the non-distributive-justice/primary rights of those for whom it is responsible—i.e., to make appropriate efforts to deter the wrongdoing that can give rise to corrective-justice rights-claims, to enable victims of such wrongdoing to secure compensation for their losses (possibly from their wrongdoers), and perhaps (for its own sake and not just for its deterrent value) to prevent wrongdoers from profiting from
their wrongs or, more strongly, to insure that a wrongdoer’s wrongdoing imposes appropriate losses on him on balance;

(3) for one of the following two reasons, liberal, rights-based States may be obligated to fulfill these obligations by establishing courts to enable victims of wrongdoing to secure compensation from their wrongdoers:

   (A) victims of wrongdoing may have a right to be compensated by their wrongful injurers; or

   (B) although victims of wrongdoing do not have a special right to insist on the government’s fulfilling its general obligation to deter wrongdoing, they do have a right to be compensated for the losses they suffered through wrongdoing and may have a right that their wrongful injurers not be allowed to profit from or indeed be punished on balance for their wrongdoing and the State in question may not have secured these victim-rights in other ways;

(4) although rights-based States can fulfill their corrective-justice obligations by passing legislation that establishes corrective-justice-related legal rights, rights-based States that have common law and common-law courts can also rely on such law and institutions to fulfill their corrective-justice-related obligations since the common law of rights-based States of moral integrity incorporates its moral commitments—i.e., since arguments derived from the basic moral principle such States are committed to instantiating are not only legitimate and valid in rights-based States of (perfect) moral integrity, they are the dominant mode of legal argument in such States; and, indeed,

(5) since the constitution of a rights-based State of perfect moral integrity would have to recognize its duty to secure all the rights of those for whom it is responsible, the constitutional law of such States would have to constitutionalize its corrective-justice commitments even if its nominally-private law did not—i.e., judges would be bound by such a rights-based State’s constitution to secure the corrective-justice rights of victims of rights-violations even if no statute authorized them to do so and they had no private common-law jurisdiction to do so.

The preceding propositions explain why I believe that judges in common-law, rights-based States are obligated to fulfill those States’ non-distributive-justice primary-rights commitments and related, secondary corrective-justice-rights commitments in cases brought by putative victims of rights-violations against their alleged wrongful injurers if (as is certainly the case in the contemporary United States) the State has not secured these rights in other ways. The argument reveals why KS were right when they initially admitted that their Double-Distortion-Argument argument sheds no light on the moral desirability of sacrificing economic efficiency to effectuate “KS desert norms” and were wrong when they subsequently ignored
this conclusion by asserting that the Double-Distortion Argument does shed light on the moral desirability of sacrificing economic efficiency to secure common-law tort and contract rights. After delineating and commenting on the preconditions for civil liability in general and the substantive content of the tort-law-related corollaries of a liberal, rights-based society's commitment to treat all moral-rights holders with appropriate, equal respect and concern, this subpart lists various reasons why courts would have to sacrifice economic efficiency to make internally-correct common-law tort-law decisions in a liberal, rights-based society.126

Although I will not try to justify this proposition here, it seems to me that in a rights-based society a court cannot legitimately hold a defendant civilly liable in a given case unless it finds that more probably than not all members of some set of sufficient conditions for liability are simultaneously satisfied—a requirement that is far more stringent than the requirement that each member of a set of sufficient conditions for liability be established on a more-probable-than-not basis. Assume, for example, that a statute or common-law doctrine stated that for a defendant to be liable in tort he must have acted negligently and his negligence must have caused a victim to suffer a loss of a kind covered by tort law.127 My position is that a court would be obligated to hold a defendant not liable if it found that (1) the probability that the defendant was negligent was 60% and (2) the probability that if he were negligent his negligence caused the plaintiff's loss was 70% because these findings imply that the probability that the plaintiff's loss was caused by the defendant's negligence was (60%)*(70%)=42%.128 Moreover, although this position is even more controversial, I believe that—in the absence of a statute that declares the contrary—a court would be obligated to define “causation” in “necessary ele-

126 For a fuller discussion of both the substance of liberal corrective-justice-relevant norms and the economic efficiency of effectuating them, see Richard S. Markovits, The Moral Basis and Economic Efficiency of the Common Law of Torts of a Liberal, Rights-Based Society of Moral Integrity (manuscript under submission available from the author, 2003).

127 Our positive law also requires that the defendant’s act must have been a “proximate cause” of the plaintiff’s loss. I have omitted this element of the tort because I find it inconsistent with our liberal commitments. I should admit, however, that some commentators think that the “proximate cause” element of a tort (or at least a properly defined “foreseeability” element) is morally defensible. Arthur Ripstein’s justification for this conclusion is that if you could have foreseen, and so could have avoided, an outcome, it counts as something that you have done. Otherwise it counts only as something that happened as a result of something that you did. See Arthur Ripstein, Philosophy of Tort-Law in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman and Scot Shapiro, eds.) 656, 664 (2002).

128 I recognize that our courts may not follow this practice—they may hold defendant liable whenever they find that the probability of each necessary element of liability is over 50%.
I will now turn to the tort-law-related corollaries of the liberal commitment to treating all relevant moral-rights holders with appropriate, equal respect and concern. After stating these corollaries, I will comment on their implications for the economic efficiency of effectuating them. Before proceeding, I want to point out an important difference between (1) the liberal evaluation of any choice on the one hand and (2) the (simplistic) utilitarian evaluation or economic-efficiency analysis of any choice on the other. This difference relates to the assumptions these three types of assessment make about what I will call the “commensurability” of the various effects that choices may have. Both (simplistic) utilitarian evaluations and economic-efficiency analyses assume that all effects of any choice are commensurable. The (unsophisticated) utilitarian measures all effects in terms of their impact on “utility,” which he assumes comes essentially in only one form. The economic-efficiency analyst measures all effects in equivalent-dollar terms. By way of contrast, liberals do not assume that all effects of a choice are commensurable. Two such incommensurabilities are particularly salient in the current context. First, as I have already indicated, liberals place in different categories the impacts a choice has on (1) the ability of individuals to lead lives of moral integrity and (2) the amount of utility that individuals obtain (where “utility” is defined in the undifferentiated way in which it is defined both by simplistic utilitarians and by KS when they talk about “welfare”). Second, unlike simplistic utilitarians and economic-efficiency analysts, liberals distinguish between the utility an individual obtains by treating others with disrespect (by committing acts he enjoys because they inflict pain on, degrade, or control them) and the utility an individual obtains from acts that liberalism does not condemn. I admit that stating that liberalism regards as “incommensurable” the “utility” someone obtains because he places a positive value in itself on treating another with disrespect and the “utility” someone obtains for other reasons that liberalism does not condemn may not be the best way to express this feature of liberalism. However, for expositional reasons, the text that follows will continue to employ this usage.

\[129\] It would not be morally impermissible for a legislature to pass a statute that declared civilly or criminally liable actors whose conduct was a sufficient but not a necessary cause of a loss (e.g., two actors who simultaneously blow up the same building) or actors whose conduct was neither a sufficient nor necessary cause of a loss (e.g., 100 polluters each of whom put three units of pollution into a medium in circumstances in which damage was zero until the medium contained 250 units of pollution and then stayed constant until pollution reached 350 units). Such a statute would be morally permissible because the actors in question would not have a moral right to engage in the conduct the relevant statutes proscribed and those statutes would achieve perfectly legitimate goals.
I should now be able to analyze: (1) the tort-law-related primary obligations of the members of a liberal, rights-based society; (2) the secondary, corrective-justice obligations of such actors; (3) the related obligations of common-law adjudicators in such societies; and (4) the reasons why the adjudicators of common-law tort-cases in such societies may be obligated to decide common-law tort cases in ways that are economically inefficient.

Private actors in a liberal, rights-based society have two primary tort-duties that do not relate to their doing avoidance-move research and two primary avoidance-move research duties. The first primary non-research-related tort-duty reflects the special value that liberals place on leading a life of moral integrity. This duty can be stated in the following way: actors in a liberal, rights-based society may not commit acts that endanger someone else’s ability to lead a life of moral integrity by creating a risk that he will be killed, deprived of the neurological prerequisites to lead such a life, deprived of physical freedom, injured in a way that forces him to focus primarily on his pain, comfort, and survival, deprived of the privacy or ability to establish intimate relationships that contribute significantly to his discovering what he values, or deprived in other ways of the self-respect that contributes to an individual’s taking his life morally seriously unless the act in question does not disfavor individuals’ taking their lives morally seriously on balance—that is, it creates benefits of the relevant kind that at least offset the relevant choice’s “life of moral integrity” costs.

The second non-avoidance-move-research tort-duty of actors in a liberal, rights-based society relates to individual choices that create a risk that others will suffer conventional utility losses. In addition to liberalism simpliciter, it reflects a corollary of the “principle of liberal dualism,” which asserts that the obligations that members of liberal, rights-based societies have when acting in political capacities are different from those they have when acting privately: in this instance, because the members of a liberal, rights-based society are not individually morally responsible for the poverty or richness of their co-members, their tort-related obligations to those co-members do not depend on income/wealth-related differences in the marginal utility of money to those individual co-members. Hence, the “undifferentiated-utility-related” as opposed to “life-of-moral-integrity-related” primary tort-duty of the members of a liberal, rights-based society is equivalent-dollar-oriented rather than conventional-utility-oriented—in particular, it is the duty not to make choices that the chooser expects will

130 I realize that the items in this list are becoming progressively “squishy”—i.e., hard to operationalize sufficiently to escape KS’ accusation of “incoherence.” The last item in the list is particularly vulnerable to this criticism because the specific things that contribute to an individual’s having the kind of self-respect that encourages his taking his life morally seriously are to a substantial degree culturally determined.
impose net certainty-equivalent equivalent-dollar losses on others unless he expects those choices to confer greater certainty-equivalent equivalent-dollar gains on himself. In essence, this monetized duty prohibits an actor in a liberal, rights-based State from disrespecting others by discounting the equivalent-dollar effects of his choice on them—that is, by making a choice whose attractiveness to him was critically affected by his placing a lower weight on the average (net) equivalent-dollar loss he expected it to impose on others than on the average equivalent-dollar gain he expected it to confer on him.

The third and fourth tort-duties of actors in a liberal, rights-based society are avoidance-move-research-related. In my judgment, actors in a liberal, rights-based State are obligated not only to make the choices that liberalism implies they are obligated to make given the information at their disposal but also to do appropriate research into the avoidance-moves at their disposal. To be more specific, the individual members of a liberal, rights-based State are morally obligated to do research that might enable them to make choices that would increase the ability of others to lead lives of moral integrity by preventing accidents or pollution that would preclude people from leading such lives for reasons that are not the responsibility of the relevant victims if they should conclude that the life-of-moral-integrity-related benefits of such research would exceed the life-of-moral-integrity-related cost of allocating resources to the relevant research. Similarly, each actor in a liberal, rights-based State is morally obligated to do research that might enable him to reduce the non-life-of-moral-integrity-related equivalent-dollar accident-and-pollution losses the potential researcher imposes

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131 The certainty-equivalent equivalent-dollar losses that an actor should expect his choice to impose on others equals the sum of the losses the relevant actor should expect his choice, on the weighted average, to impose on others and the risk costs that he should expect his possible victims to bear in relation to those losses. Two problems arise in relation to these risk costs. First, their magnitude will depend on whether the victim or the injurer will have to bear any losses that eventuate, and, if the injurer is liable only if negligent, there will be no straightforward way to determine whether the injurer was negligent in some cases (at least if negligence is to be determined by comparing the injurer’s weighted-average-expected cost of avoidance with the effect of the avoidance-move on the sum of (1) weighted-average-expected accident losses and (2) the sum of potential injurer and potential victim accident-loss-related risk costs). See Richard S. Markovits, Risk Costs, Tort-Dispute-Resolution-related Allocative Transaction Costs, and the Problematic Character of Hand-Type Operationalizations of Negligence (unpublished manuscript available from the author, 2002). Second, to the extent that the risk costs that potential victims face are a function of their income/wealth positions, counting them may be inconsistent with the principle of liberal dualism.
I will now examine in the indicated order the reasons why adjudicators in a common-law tort-suit in a liberal, rights-based State may be obligated to resolve the following three issues in an economically-inefficient way:

1. Is the defendant liable to the plaintiff because he caused the plaintiff to suffer a loss tort law covers by making a choice that violated a primary tort-duty that did not relate to his doing avoidance-move research?
2. Is the defendant liable to the plaintiff because he caused the plaintiff to suffer a loss tort law covers by making a choice that violated a primary tort-duty to do appropriate avoidance-move research?
3. Assuming that the defendant in a common-law tort suit in a liberal, rights-based society is liable to the plaintiff, how much in damages is the defendant liable to pay the plaintiff?

To simplify the exposition, I will assume throughout that the decisions the relevant adjudicators make on these issues will not generate any allocative transaction costs.

On this assumption, the internal-to-law correct answer to the first of the above three questions may be economically inefficient for two incomensurability-related reasons and for five non-incommensurability-related reasons. Both of the types of incomensurability that I claim liberalism asserts can cause the internal-to-law correct answer to the first of the three questions listed above to be economically inefficient. Thus, the fact that liberalism gives higher priority to individuals’ leading lives of moral integrity than to their experiencing undifferentiated utility can render the internal-to-law correct answer to the question, “is the defendant liable to the plaintiff because he caused the plaintiff to suffer a loss tort law covers by making a choice that violated the defendant’s non-avoidance-move-research tort-law duties,” because: (1) it implies that actors in a liberal, rights-based society have a duty not to make choices that reduce the ability of other, extant, relevant moral-rights holders to lead lives of moral integ-

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132 The research-related tort-duties of members of a liberal, rights-based society relate to research that might enable them to reduce the damage they inflect on others by causing accidents and pollution because liberalism does not recognize moral duties to oneself.

133 The fact that I have not collapsed the research and avoidance-choice obligations will affect the conclusion in some cases. Assume that an actor who has done too little tort-related research rejects an avoidance-move that he mistakenly believes would yield others an equivalent-dollar gain that exceeds its equivalent-dollar cost to him. I believe that such an individual should be held liable even though, had he done the research he was obligated to do, he would have correctly concluded that he was under no obligation to make the avoidance-move in question. This conclusion is favored by the normative maxim, “No person should profit from his own wrong.”
rity by causing accidents or generating pollution unless those choices do
not on balance reduce the extent to which relevant individuals are in a posi-
tion to lead such lives—i.e., unless the choices in question enable the
chooser and/or other individuals to lead lives of moral integrity in other
ways to at least as great an extent as they prevent some relevant actors from
leading such lives; and (2) in some instances, although most members of a
liberal, rights-based society will place a high equivalent-dollar value on
their leading a life of moral integrity, some members of such a society who
do not personally subscribe to the beliefs that underlie their society’s
moral-rights commitments will place a sufficiently low equivalent-dollar
value on leading a life of moral integrity to render economically inefficient
choices that liberalism requires to be made, despite the strong “preferences”
and external preferences of the majority.

The second kind of “incommensurability” that I argued liberalism rec-
ognizes may also make the internal-to-law correct answer to the first ques-
tion listed above economically inefficient. As previously indicated, this
second type of “incommensurability” relates to the valuation of certain
“benefits” that actors may secure from making certain choices—namely,
the pleasure or satisfaction they obtain because their choice inflicts pain on,
degraded, or controls its victims. Although, from the perspective of eco-
nomic-efficiency analysis, the equivalent-dollar gains that choices confer
on their makers on those accounts count the same as any other equivalent-
dollar gains, such “benefits” would not count positively toward the moral
permissibility of the choices in question in a liberal, rights-based society.
To the contrary, in such a society the presence of such gains might very
well assure the moral impermissibility of the choices that yield them. Re-
latedly, although the fact that the person who has suffered pain, been de-
graded, or been controlled placed a positive equivalent-dollar value or a
low negative equivalent-dollar value on that experience would determine
the relevance of those impacts for the determination of the economic effi-
ciency of the choices that generated them,134 it would not have any such
effect on the liberal evaluation of the choices that produced the effects in
question.

There are also at least five non-incommensurability reasons why the
internal-to-law correct answer to the first question may be economically
inefficient. The first such reason relates to the conventional-utility-related
branch of the liberal non-avoidance-move-research-related tort-obligations.
This reason derives from the fact that actors are at least sometimes misin-

134 Admittedly, in theory, an economic-efficiency analysis would not incorporate the relevant
“victims’” evaluations if they were thought to be tainted by the victims’ non-sovereignty and/or non-
maximization, but in practice economists tend to be extraordinarily reluctant to acknowledge this reality
and would have no ability to adjust to it if they did acknowledge it.
formed about the set of avoidance-moves available to them or the allocative efficiency of the avoidance-moves that they realize they have the opportunity to make.

Some explanation is required. If liberalism recognized relevant moral duties to oneself, it would obligate all actors in a liberal, rights-based society who might otherwise impose accident-generated “mere” utility-losses on others to make those related avoidance-moves and only those related avoidance-moves that were economically efficient if those actors who fulfilled their accident-related research obligations would be perfectly informed about the allocative costs and benefits of all related avoidance-moves available to themselves and others. However, even if liberalism did recognize an actor’s obligation to himself it would not obligate him to make economically-efficient avoidance-move choices if the relevant choosers had imperfect information, because in this case their failure to make an economically-efficient avoidance-move choice might reflect their failure to perceive its economic efficiency rather than their discounting its net equivalent-dollar impact on others. This conclusion has tremendous empirical significance in a highly-Pareto-imperfect world. Thus, regardless of whether the relevant actors’ required research would leave them perfectly informed about the kinds of private costs and benefits on which the Hand formula focuses, it would not leave them perfectly informed about the allocative counterparts of those private costs and benefits in our highly-Pareto-imperfect world in which, for example, imperfections in the price competition faced by the factor rivals of the potential avoiders, the potential employers of the potential victims of the accidents in question, and the factor rivals of some of these potential employers will cause the private costs and benefits in question to diverge from their allocative counterparts. More specifically, because in our highly-Pareto-imperfect world actors who have done appropriate research will sometimes believe that it would be economically efficient for them to make an avoidance-move that would in fact be economically inefficient and will sometimes believe that it would be economically inefficient for them to make an avoidance-move that would in fact be economically efficient, if liberalism recognized relevant duties to oneself, common-law adjudicators in liberal, rights-based societies would be obligated to find the actor in the former case liable for rejecting an economically-inefficient avoidance-move and would be obligated to find the actor in the latter case not liable for rejecting an economically-efficient avoidance-move even if the adjudicators could assess the actual economic efficiency of the avoidance-moves in question accurately and costlessly. In

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fact, these conclusions would not be altered if the judge or some other government official could identify the source of the relevant research’s erroneous conclusion and formulate legislation that would increase economic efficiency in the future by disseminating the relevant information so that future potential avoiders’ appropriate research would take the relevant problem into account or by imposing concrete avoidance-obligations on future potential avoiders to make the decisions they would have been obligated to make if the accident-research that they were obligated to execute yielded accurate conclusions. I should note, however, that although it would almost certainly be morally desirable and might be morally obligatory for a liberal, rights-based society’s legislature to take these steps, the justification for its doing so is not really a primary-right corrective-justice-related justification since the relevant legislation would not be directed at preventing the commission of or securing redress for civil wrongs.

The second reason other than incommensurability why the internal-to-law correct decision in a torts case in a liberal, rights-based society might not be economically efficient is the fact that liberalism does not recognize “duties to oneself.” This proposition clearly implies that an actor in a liberal, rights-based society would not have violated a moral duty by knowingly rejecting an economically-efficient avoidance-move that would have benefited only him in his capacity as his own potential victim. Admittedly, this conclusion would have no bearing on the common law of torts since someone who is his only victim would presumably not be entitled to sue himself in tort. However, in other tort situations, the fact that liberalism does not recognize “duties to oneself” might obligate courts in common-law torts cases to reject an independent victim’s claim despite the fact that he was injured by the defendant’s economically-inefficient avoidance-move rejection. Assume that an actor who was both a potential injurer and one of his own potential victims failed to make an economically-efficient avoidance-move that, given his information-base:

1. he should have expected would not reduce the equivalent-dollar losses that others suffered on balance;
2. he should have expected would reduce the equivalent-dollar loss that one or more potential victims other than himself would suffer (which would be consistent with the first assumption if he should have expected the move to reduce the equivalent-dollar accident losses that other such potential victims would incur);
3. he should have expected would reduce the equivalent-dollar loss the potential injurer would suffer in his capacity as a potential victim in circumstances in which the equivalent-dollar gains that he should have expected the avoidance-move to confer on the potential injurer in his role as his own potential victim would render the avoidance-move in question economically efficient.
Because liberalism does not recognize duties to oneself (at least when the purported duty would relate to mere utility consequences), the potential injurer in the above example would not have violated any moral obligation by rejecting the economically-efficient avoidance-move in the situation in question. On these facts, the potential injurer’s rejection of the relevant avoidance-move could not have been critically affected by his discounting the equivalent-dollar impact that that choice had on others because it did not impose a net equivalent-dollar loss on others. Hence, an adjudicator of a common-law tort-suit brought by a victim (other than himself) of the relevant potential injurer’s avoidance-move rejection would be obligated to reject the victim’s claim despite the fact that the plaintiff-victim was injured by the injurer’s rejection of an economically-efficient avoidance-move.

The third non-incommensurability reason why the internal-to-law correct resolution of the case on which we are now following in a common-law tort case in a liberal, rights-based society may be economically inefficient reflects features of the conception of corrective justice (as opposed to features of the liberal conception of corrective-justice-relevant primary rights) that are problematic from the perspective of economic efficiency when adjudicators have imperfect information. As I have already indicated, an adjudicator in a common-law tort-suit in a liberal, rights-based society cannot correctly hold a defendant liable unless he concludes that more probably than not the following two conditions were jointly satisfied: (1) the defendant violated his private moral duty to treat others with appropriate, equal respect and concern; and (2) this violation caused the plaintiff to suffer a kind of loss covered by accident law. In a world in which adjudicators have only imperfect information about the relevant moral-duty-violation and causation issues, there will be many cases in which a decision in plaintiff’s favor will be internal-to-law incorrect even if it would be economically efficient. For example, this conclusion would be warranted in the following type of situation:

(1) the trier of fact knows that, at the time that the victim made his relevant choices, the victim did not believe and should not have believed that he could avoid economically efficiently;
(2) the trier of fact knows that the victim could not avoid economically efficiently;
(3) the trier of fact knows that the injurer’s choice caused the victim’s loss; and
(4) the trier of fact concludes that the probability that the injurer violated his liberal duty by rejecting an avoidance-move whose execution the injurer realized would have been economically efficient was higher than 0% but not higher than 50%.
This conclusion would also be warranted in the following type of situation:

(1) the trier of fact knows that, at the time the victim made his relevant choices, the victim did not believe and should not have believed that he could avoid economically efficiently;
(2) the trier of fact knows that the victim could not have avoided economically efficiently;
(3) the trier of fact knows that the injurer failed to make an economically-efficient avoidance-move that the injurer knew (or should have known) he was morally obligated to make;
(4) the trier of fact concludes that the probability that the injurer’s wrongful act caused the victim’s loss was higher than 0% but not higher than 50%.

Most generally, the above conclusion will be warranted whenever the first two assumptions in the above two lists are justified and the product of the probability that the defendant violated his relevant duty and the probability that his violation of that duty actually injured the plaintiff was higher than 0% but not higher than 50%. I hasten to point out that it would usually be morally permissible for a legislature to pass a statute that made the injurers in such cases liable for the losses the relevant victims suffered. Indeed, my inclination is to conclude that the governments of a liberal, rights-based State are morally obligated either to pass such a statute or to compensate the relevant victims directly. In the United States, I would argue that the state governments were constitutionally obligated to pass such statutes by the privileges or immunities clause of the Fourteenth Amendment (combined in the case of non-citizen victims with the equal-protection clause of that amendment). However, this conclusion does not imply that the relevant victims are entitled to win a common-law tort-suit against the relevant injurers.

The fourth reason why the internal-to-law correct resolution of the issue, “is the defendant in a common-law tort-suit in a liberal, rights-based society liable to the plaintiff because the defendant harmed the plaintiff by violating a primary non-avoidance-move-related tort-duty,” may be economically inefficient involves another aspect of the concept of causation that our corrective-justice commitment incorporates. Although I recognize the contestability of this claim, I am inclined to believe that in a corrective-justice case, a defendant should not be concluded to have caused a loss unless his choice was a but-for cause of the loss’ occurring in the way it did even if his choice was a necessary element of a set of possible sufficient causes of the relevant loss occurring. This possibility is salient in “simultaneous independent causation” cases (e.g., cases in which two hunters shoot
bullets that simultaneously kill the victim and cases in which a loss occurs because a consumer who did not bother to read a warning label from which the manufacturer omitted the crucial warning was injured because he misused the product in the way the manufacturer should have warned him not to do).

This possibility is also salient in cases in which the function relating the loss that pollution generates is a step function of the amount of pollution—say, in a case in which 100 polluters put three units of pollution each into some medium in circumstances in which the damage would be zero between one and 150 units of pollution but positive and constant between 151 and 350 units of pollution. If, as I am suggesting, in both these types of cases it would be internal-to-law incorrect for a common-law adjudicator in a liberal, rights-based society to find any defendant liable, such internally-correct conclusions would clearly be economically inefficient in those instances in which it would be economically efficient to prevent the hunters from firing the fatal shots, to prevent the manufacturer and his customer respectively from omitting and failing to read the critical warning, and to prevent some potential polluters from emitting the relevant pollutants. I hasten to add that I am not suggesting that it would be morally impermissible for the legislature of a liberal, rights-based State to pass legislation that would increase economic efficiency by making one or more “injurers” liable in such cases. My point is solely that it would be internal-to-law incorrect and therefore morally impermissible for common-law adjudicators to rule that the relevant parties were liable.

The fifth and final non-incommensurability reason why the internal-to-law correct resolution of the issue on which we are now focusing in a common-law tort-suit in a liberal, rights-based society might be economically inefficient relates to our practice of precedent. Even when a defendant’s liberal duty would have been to make an economically-efficient avoidance-decision in the absence of any legal precedent to the contrary and it would have been legally correct as well as economically efficient for an adjudicator to enforce that duty in a case of first impression, it might be internal-to-law incorrect though still economically efficient for the relevant adjudicator to enforce that duty if previous courts had made internal-to-law errors in decisions whose erroneousness was not sufficiently patent to eliminate the defendant’s moral and legal right to rely on them.

Admittedly, many of my reasons for concluding that—even if allocative transactions costs could be ignored—adjudicators in common-law tort suits in our society would sometimes be obligated to make economically-inefficient decisions about whether injurers are liable to victims because the injurers failed to fulfill their primary non-research tort obligations presuppose the correctness of: (1) my conclusion that ours is a rights-based society; (2) my conclusion about the moral obligations of adjudicators in rights-based societies; (3) my conclusion that in a rights-based society of moral
integrity arguments of moral principle dominate the other legitimate modes of argument that can be used to determine moral-rights-based tort-law rights; (4) my conclusion that our society is a liberal, rights-based society; and (5) my conception of liberalism and its more concrete tort-law-related corollaries. However, in many instances, some or all of my arguments for this conclusion are not dependent on the correctness of my positions on these issues. I will not take the space here to investigate these issues. For present purposes, I will confine myself to concluding that—if I am correct about these more basic issues—the duty of adjudicators in our society to resolve common-law non-research tort-duty issues in a way that is consistent with the combination of our society’s liberal, primary-right-determining (corrective-justice-relevant) desert norms and our corrective-justice commitments will often require them to sacrifice economic efficiency even if the allocative-transaction-cost consequences of adjudicatory interventions could be ignored.

For the same reasons, the decision that would be internally correct for an adjudicator to make in a common-law case in a liberal, rights-based society in which a victim claimed the right to recover his loss from an injurer who had violated his avoidance-move-research duties will sometimes be economically inefficient. Thus, such an adjudicator may be obligated to find that the injurer was bound to do avoidance-move research that would have been economically inefficient or was not bound to do avoidance-move research that would have been economically efficient if:

1. the value that liberalism placed on the research’s positive impact on individuals’ leading lives of moral integrity was critically greater than the value that some members of the relevant society placed on this impact;
2. the research in question would tend to reduce the extent to which some individuals obtained pleasure from treating others with disrespect (e.g., by discovering a production process that limited the ability of some employees to degrade other employees or customers);
3. appropriate research by the injurer into the economic efficiency of the avoidance-move research he could do would have led him to conclude that economically-inefficient avoidance-move research would be economically efficient or that economically-efficient avoidance-move research would be economically inefficient;
4. the researcher was one of the potential victims whose loss the research might reduce or eliminate;
5. the trier of fact’s perception that the product of (a) the probability that the researcher knew or should have known that he was obligated to do the research and (b) the probability that the injurer’s failure to do the research caused the victim’s loss was higher than 0% but not higher than 50%.
the failure of any individual potential avoidance-move researcher to do the relevant potentially-economically-efficient research was not a necessary cause of the loss occurring in the way it did though it was a necessary element of a set of sufficient causes of the loss occurring; and

(7) the economically-efficient decision was rendered internal-to-law incorrect by an applicable precedent on which a relevant party was morally and legally entitled to rely.

Finally, I should point out that, regardless of whether adjudicators in common-law tort-suits in a liberal, rights-based society resolve the question, “is the defendant liable to the plaintiff,” in the way that is economically efficient, the internal-to-law correct answer to the question, “how much in damages is a liable defendant obligated to pay his victim,” will sometimes be economically inefficient. In particular, even if one ignores the complications introduced by the private and allocative transaction costs of responding to tort claims of different sorts, there are at least two sets of circumstances in which the damage award that would be best from an economic-efficiency perspective might not be justified in corrective-justice terms:

(1) when various Pareto imperfections other than the potential externality on which the tort suit is focusing would distort the profitability of avoidance to potential injurers who knew they would have to compensate their conventional victims for their private losses by distorting the private cost of the potential injurers’ relevant avoidance-moves and/or the private loss the relevant victims suffered; and

(2) when the relevant potential avoider was not a sovereign maximizer.

In short, at least if I am correct about a number of philosophical, jurisprudential, and societal-moral-identity issues, adjudicators in common-law tort-cases in the countries that KS seem to have in mind will at least sometimes be bound to resolve liability issues in non-avoidance-move-research tort-obligation cases, liability issues in avoidance-move-research tort-obligation cases, and damages issues in both these sorts of cases in ways that are economically inefficient.

VI. THE APPLICABILITY OF KS’ FIRST CLAIM TO “ADJUDICATORS”

This part addresses the following two issues: Assuming ad arguendo KS are correct in maintaining that it will always be more desirable to effectuate certain types of distributional norms through the kind of tax policy they are commending rather than by making economically-inefficient ad-
justments in legal rules and that “legislators” should therefore always try to
effectuate such norms through tax policy alone, does this conclusion imply
that “adjudicators” (1) are always morally obligated to; and (2) always
morally-ought to reject all legal-rights conclusions that would sacrifice
economic efficiency to instantiate the distributional norms that a “legisla-
tor” could effectuate more desirably through tax policy? These two issues
will be salient in two kinds of situations:

(1) when “legislators” have not followed KS’ advice—when they
have effectuated the kinds of distributional norms that can be effectuated
least-economically-inefficiently and most desirably through tax legislation
by promulgating unnecessarily-economically-inefficient and undesirable
legal rules; and

(2) when (A) “adjudicators” have chosen to effectuate the kinds of
distributional norms that can be effectuated least-economically-inefficiently
and most desirably through tax legislation by incorrectly deciding common-
law cases (i.e., by announcing incorrect common-law rules) or by misinter-
preting statutes that KS would commend and (B) given the number of cases
that relied on these rules or interpretations or cited them approvingly, the
length of time during which they have been followed, the hierarchical status
of the judges who announced/made the common-law rules/legal interpreta-
tions in question and/or relied on them, the individual reputations of the
judges who announced/made or relied on them, the extent to which the le-
gal rules or interpretations in question were briefed and discussed at oral
argument, the extent to which they were discussed in the opinions that an-
nounced or relied on them, the non-obviousness of the mistakes in question,
the absence of any significant change in the legal background and social
realities that affect their correctness, and the extent to which individual
actors have relied on them, the doctrine of precedent makes these legal
rules or interpretations (which were incorrect when announced) internally-
correct statements of the law at the later date at which the “adjudicators”
whose choices are to be assessed must decide cases to whose resolution
they are relevant.

I will first address the moral obligations of “adjudicators” in these
types of situations and then comment on the analysis of what “adjudicators”
morally-ought to do in these sorts of cases. I believe that a corollary of the
duty of respect that all members of a liberal, rights-based society have is
that “adjudicators” in such societies are morally obligated to make their
best efforts to render internally-correct legal-rights decisions, at least when
those decisions are not inconsistent with the moral commitments of the
society in which they are performing their judicial roles. This conclusion is
a corollary of the liberal duty of respect, which implies inter alia that the
members of a liberal, rights-based society have a right to be the authors of
the laws that will subsequently constrain them.\footnote{Admittedly, this conclusion implicitly assumes that (1) there are internally-right answers to at least some legal-rights questions and (2) some of those internally-right answers favor decisions that KS would conclude are unnecessarily-economically-inefficient and undesirable. As many experts have recognized, these conditions may be fulfilled in the United States even if my conclusions about the moral character and commitments of our society and the structure and content of legitimate and valid legal argument in our society are false. Thus, not only Liberal Legalists such as Ronald Dworkin, David A.J. Richards, and me but also some Legal Realists such as Karl Llewellyn, some legal historians of ideology such as Cass Sunstein and Richard Epstein, some Wittgensteinian jurisprudences such as Philip Bobbitt, and Strict Constructionists such as Robert Bork and Lino Graglia believe that there are internally-right answers to a considerable number of legal-rights questions in the United States and that the law these answers constitute sometimes redistributes resources between or among income or income/wealth classes in an "unnecessarily"-economically-inefficient and undesirable way. For a discussion of this claim and citations to the works of the above scholars and many others who would agree with the preceding proposition, see Markovits, supra note 63, at 440-60.} In any event, this conclusion implies that in virtually all cases in the two categories distinguished above “adjudicators” would be morally obligated to reject the recommendations KS have made for legislators even if those recommendations were perfectly justified as they applied to “legislators.”

Admittedly, however, the preceding \textit{moral-obligation} conclusion does not resolve the issue of what “adjudicators” \textit{morally-ought} to do in such cases. The resolution of the moral-ought issue depends not on the moral norms that the evaluator is committed to instantiating by virtue of his membership in the community in question (or at least does not do so directly) but on the moral norms to which he has personally chosen to subscribe. Such personal ultimate values will determine his general view of the moral desirability of judges’ fulfilling their obligations both directly and indirectly by controlling his evaluation of the possible consequences of any tendency that judges’ violating their obligations in these sorts of cases may have to induce them (and other government officials and various private actors) to violate their obligations in other kinds of situations.

\section*{VII. KS’ \textbf{TREATMENT OF THE RELEVANCE OF THE IMPERFECTNESS OF OUR ACTUAL TAX LAWS}}

KS’ recommendation that government decision makers not adjust legal rules in an economically-inefficient way to effectuate distributional norms that could be effectuated less-economically-inefficiently and more desirably through taxes is based on the assumption that the superior tax policies in question are politically available. Although KS clearly realize that this assumption is unrealistic, they discuss the significance of this fact only briefly.\footnote{KS openly admit this fact. See KS 2000 at 834 n.30, \textit{citing} KS 1994 at 675.} In particular, KS make no comment on the significance of
such political realities for “legislators” who are in a position to control non-tax policies (but presumably are not in a position to remove the imperfections in the tax policies in question) and suggest two reasons why such political realities may have no bearing on the decisions that courts (in my terms, “adjudicators”) should make. This part criticizes KS’ treatment of this issue.

KS’ silence on the significance of the State’s failure to adopt the tax policies they are recommending for the other decisions that “legislators” must make is hard to justify. Perhaps their neglect of this issue reflects a belief that those legislators whom they have not persuaded to adopt their tax recommendations are unlikely to be persuaded to make third-best or even desirable adjustments to this decision. If so, their reaction is misguided on two accounts. First, even if the same individuals who controlled the imperfect tax-policy choice controlled all other sorts of legislative choices, the factors that led them to reject the “third-best overall” tax policy might not be relevant or as influential in relation to their making the non-tax decisions that would be third-best-overall or at least somewhat-desirable adjustments to their imperfect tax choice. Second, at least in our legislative system, the individuals who control tax policy in a given state legislature or in the national legislature are unlikely to control all other sorts of legislative decisionmaking: some of these other decisions will be controlled by legislatures in the other part of our federal system and others by members of different legislative committees in the same part of our federal system.

KS’ two brief references to possible reasons for believing that “adjudicators” should not be influenced by the imperfectness of actual tax policy are also unsatisfactory. The first reason is implicit in KS’ somewhat-cryptic statement that they have ignored the possibility that it may be desirable for courts to respond to the reality that “the tax system falls short of optimal redistributive taxation—perhaps because of the balance of political power in the legislature” by adopting economically-inefficient, redistributive legal rules because “[t]his argument raises questions we do not seek to address about the function of courts in democracy.” This statement seems to imply that KS reject this proposal because, “in a democracy,” courts should not behave in this way. Although I agree that, in our kind of democracy,

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138 By “third-best overall,” I refer to the choice that would be best taking the following three facts into account: (1) the world contains a large number of both Pareto imperfections and moral imperfections; (2) data on these imperfections is inevitably both costly and imperfect; and (3) analyses of the implications of the imperfections that have been identified for the best resolution of any issue are inevitably costly and usually imperfect.

139 KS 1994 at 675.

140 I would say that the legitimate function of “courts” in a democracy depends both on the formal and informal features of the democracy in question and on the reasons why the society in question has
it is not morally permissible or desirable for “adjudicators” to adjust legal rules to achieve desired distributional goals that tax law could have but did not achieve, I still have four objections to KS’ brief reference to this possibility:

1. they should have made this point explicitly rather than cryptically;
2. they should have paid attention to the distinction between situations in which the legislature failed to effectuate desired distributional personal ultimate values and situations in which the legislature’s tax policy failed to fulfill our society’s distributional moral obligations;
3. they should have laid the philosophical and jurisprudential predicates for their conclusion; and
4. they should have noticed that this conclusion is inconsistent with their apparent belief that courts should always resolve those tort disputes that involve corrective-justice claims in the way that is most economically efficient.

KS’ second suggestion as to why the failure of the political system to adopt the tax policies they are recommending might not or would not render it desirable for courts to make economically-inefficient adjustments in legal rules to effectuate the distributional norms tax law failed to effectuate is that “it seems unlikely that courts can accomplish significant redistribution throughout the legal system without attracting the attention of legislators”141—i.e., without inducing “legislators” to make choices that undo the courts’ redistributive efforts. I have two objections to this argument.

My first objection is that—even if the efforts of the courts to redistribute income do not change the political balance of power on related issues by changing people’s distributional values or their ability to grasp some of those values’ concrete implications—the fact that courts that behaved in this way would in one sense be attempting to reverse the legislature’s action does not guarantee that the legislature that passed the original imperfect tax legislation would be able to counter the courts’ efforts. Among other reasons, this conclusion reflects the following facts:

chosen to adopt a democratic form of government (e.g., on whether it has done so to increase utility or to manifest respect for the governed by giving them appropriate roles in determining the laws that constrain and succor them). Not surprisingly, then, my view of the legitimate role of “adjudicators” in the United States turns on my conclusion that the American commitment to democratic political processes is a corollary of a more general moral-rights commitment to showing appropriate, equal respect for all members of the relevant community by empowering them to be the authors of the laws that govern them.

141 KS 1994 at 675.
(1) the fact that a particular legislative coalition can be put together at one time when various members want to get certain things from each other (which, once given, are costly or impossible to take back) does not mean that the same coalition can be put together at a later date even if the membership of the legislature in question and the values and motivations of its individual members have not changed;

(2) the fact that legislators may have to incur special costs to pass legislation that in effect reverses judicial decisions, changes the jurisdiction of the courts, controls who is appointed to the courts, or packs the courts;

(3) the fact that the federal (state) legislators who passed the imperfect tax legislation may not be in control of the state (federal) law that the courts are changing to overcome the distributional inadequacy of the relevant tax legislation, may not be able to control the jurisdiction of the relevant courts, and may also not be able to control the identity of the relevant judges;

(4) the fact that the legislation that the relevant legislature would have to pass to offset the distributional consequences of the relevant court-decisions may be less attractive on other grounds to those who supported the relevant tax legislation than the consequences of their distributionally-imperfect tax legislation; and

(5) the fact that, either because individual members of the relevant legislature have changed their minds about the wisdom or appropriateness of the imperfect tax legislation and/or because the membership of that legislature has changed since the imperfect tax legislation was passed, the legislature in question may not want to offset the courts’ efforts to secure the redistributions the tax law failed to secure, though timing-problems, the added allocative cost of altering existing tax systems, and/or the unwillingness of individual legislators to admit that they or their institution made a mistake may deter the legislature in question from correcting the imperfect tax legislation itself.

My second objection to KS’ empirical claim is that it ignores the possibility that the efforts of courts to secure the redistribution the relevant legislature’s tax policy failed to secure may deter legislative efforts to offset the redistributions the courts effectuated by changing the information, distributional values, or awareness of the concrete implications of given distributional values of the members of the legislature in question and/or their constituents. The courts’ decisions and opinions may increase the legislators’ awareness of the value-significance of their tax-policy choice, may persuade them that the redistribution they failed to secure was originally more valued by their constituents than they believed, and may persuade members of the public that the sacrificed redistribution was more valuable than they originally perceived by convincing them of the attractiveness of
the value that was imperfectly effectuated and/or by revealing to them some concrete implications of that value.\textsuperscript{142}

I also have a comment to make on KS’ second reason for suspecting that the imperfectness of actual tax legislation may not affect what “adjudicators” should do. If this second argument is correct—that is, if courts should not sacrifice economic efficiency to effectuate the kinds of values KS claim can be effectuated less-economically-inefficiently and more desirably through tax policy because any such redistributions the courts effectuate will be reversed by the legislature—the soundness of KS’ recommendations to the courts will not depend on the correctness of their Double-Distortion-Argument argument (or its Extra-Distortion-Argument analog): even if the Double-Distortion-Argument argument were wrong, KS’ “costly spinning of the wheels” argument for the irrelevance of the imperfectness of actual tax legislation for the legal-rule adjustments courts should make would imply that courts should not make such adjustments.

VIII. KS’ Treatment of the Possibility That It May Be Economically Efficient to Make Liability (Entitlement) and Damages (Compensation) Decisions Depend on the Plaintiff’s and/or Defendant’s Absolute or Relative Income or Income/Wealth Positions

KS recognize two reasons why it may be economically efficient to make liability and damages decisions depend on the earned-income or income/wealth position of one or both litigants. First, KS recognize (though they seem to misdescribe) the possibility that such an approach may be economically efficient for purely correlational reasons—i.e., because (1) the earned income or income/wealth position of a party is highly correlated with something else that an economically-efficient legal rule would take into account; and (2) the allocative transaction-cost savings of adopting a legal rule that explicitly makes the legal outcome depend on the relevant party’s earned income or income/wealth position rather than on the something else that is really relevant but more expensive to estimate exceed the amount of economic inefficiency that the imperfectness of the correlation will cause. This second condition will be fulfilled if (A) the proved-up earned income or income/wealth position of the individual is a less accurate indicator of what is really relevant than the proved-up estimate of what

\textsuperscript{142} For a related discussion of the so-called “expressive value” of law, see Hanoch Dagan, \textit{Takings and Distributive Justice}, 85 VA. L. REV. 741, 771-72 and 791 (1999).
really is relevant would be and (B)(i) making the legal outcome a function of a party’s earned income will distort market-labor/do-it-yourself labor/leisure choices and (ii) making the legal outcome a function of a party’s income or income/wealth position will distort not only those choices but also savings/consumption/present-gift-giving/future-gift-giving/bequesting choices. More particularly, although KS are not persuaded by Sanchirico’s example, which is based on the assumption that klutziness (accident-proneness) is positively correlated with an individual’s richness, and are skeptical that the kind of (social?) correlations on which Sanchirico is focusing will ever make it economically efficient to redistribute income from the rich to the poor or vice versa by adjusting legal rules to make liability or damages decisions depend on the litigants’ earned incomes or income/wealth positions, they are willing to admit that it may be possible and third-best-economically-efficient to establish correlations of these kinds that would render such legal-rule adjustments economically efficient.

Moreover, although they do not seem to recognize this fact, KS themselves admit that a different kind of correlation (which might be denominated an “economic” correlation) will make it economically efficient to make an injurer’s liability or a victim’s entitlement depend on his earned income, at least in jurisdictions in which a variant of our current negligence/contributory-negligence regime that focuses on allocative rather than private avoidance-costs and avoidance-benefits would be the most economically-efficient way to resolve accident-disputes. Thus, KS argue that in such a regime it will be economically efficient to make the decision as to whether an injurer is negligent or a victim is contributorily negligent partly dependent on their earned incomes because those incomes will determine the private cost to them of making avoidance-moves whose identification and execution will consume their time, avoidance-moves whose execution

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143 I should note that in some cases one will be able to estimate the magnitude of the factor that is really relevant more accurately indirectly, by estimating something with which it is correlated, than directly.
144 See KS 2000 at 827-32.
146 Such a correlation could exist either because for genetic reasons the attributes that are positively correlated with an individual’s income are negatively correlated with his physical dexterity or, more plausibly, because (1) in our culture intellectual “dexterity” is more highly correlated with richness than physical dexterity, (2) both kinds of dexterity are partly a matter of practice, and (3) individuals who are richer are that way not only because they have greater intellectual potential but also because they have devoted more time to developing their intellectual dexterity and less time to developing their physical dexterity than do individuals with lesser intellectual potential.
147 See KS 2000 at 832-34.
148 See KS 1994 at 676.
149 KS do not state that their example depends on this qualification.
may be more economically efficient (less economically inefficient) than any other move available to them.

KS are correct in asserting that the relevant parties’ net wage-rates will indicate the private cost to them of foregoing the labor or leisure they would have to sacrifice to identify and execute the relevant time-consuming avoidance-moves. However, KS are wrong in thinking that this connection can provide the basis for a causal, as opposed to a correlational, argument for the economic efficiency of making liability decisions depend on the earned incomes of the litigants. The economic efficiency of the relevant avoidance-moves depends on their allocative cost, not on the private cost to the avoider, and the allocative cost of an avoidance-move will not generally equal (and will at most be positively correlated with) its private cost to the avoider.

KS do recognize a truly different second reason why it may be economically efficient to adopt an extra-distortion-generating legal rule that makes an individual’s expected legal liability a function of his richness: viz., the possibility emphasized by Second-Best Theory that the extra distortion such a rule introduces may counteract the net distortion in the private profitability of one or more decisions it affects that is generated by the other Pareto imperfections in the system (more precisely, may reduce the...
absolute value of the aggregate distortion in the private profitability of such
decisions\(^\text{153}\)). However, immediately after articulating this possibility, KS
assert that it has no practical significance in the current context.\(^\text{154}\)

The following example—suggested to me by Hanoch Dagan’s article
on takings\(^\text{155}\)—suggests that KS’ dismissal of the importance of this possi-
bility may be unjustified. The central premise of this argument is that, from
the perspective of economic efficiency, the poor have too little political
influence. More generally, I assume (somewhat simplistically) that the ex-
tent to which the equivalent-dollar impact that a physical taking or regula-
tion under consideration by government will have on any individual (group
of individuals) will bear on the decision government makes is inversely
related to that individual’s (group of individuals’ average) income/wealth
position and that—if government did not have to compensate the victims
of its takings and regulations—its decision makers would in effect discount
the equivalent-dollar impact of their decisions on the relatively poor while

causes the certainty-equivalent amount of damages that yacht owners should reckon with paying in
relation to the accidents their yacht may cause to exceed the allocative losses those accidents will gen-
erate (in their words, “a legal rule that disadvantages yacht owners, say by imposing additional damages
when yachts cause accidents”) will tend to increase economic efficiency by reducing the amount of
misallocation the labor/leisure choices of prospective yacht owners generate—i.e., by creating an imper-
fection that will generate a deflation in the “profitability” of consuming leisure to these individuals
that will counteract the inflation in this profitability generated by the taxation of earned income. (A fuller
analysis would have pointed out that the legal rule in question (1) would tend to reduce labor/leisure
misallocation only if it reduced the absolute aggregate distortion in the private profitability of prospec-
tive yachtsmen’s consuming leisure and (2) would increase economic efficiency on balance only if the
increase in labor/leisure economic efficiency were not outweighed by such a “rule’s” other misalloca-
tive effects—e.g., its tendency to cause too few yachts to be consumed from the perspective of eco-
nomic efficiency and its tendency to cause the prospective non-yacht-owner victims of yachting acci-
dents to reject economically-efficient avoidance-moves or to misallocate resources by putting them-

themselves in harm’s way when such choices will not or may not result in their being barred from recovery
or their recovery’s being critically reduced [because of problems of proof or doctrinal deficiencies].) See
KS 2000 at 825-26 for their discussion of this example. See also id. at 824 n.5 for their general state-
ment of the point of Second-Best Theory.

\(^\text{153}\) KS do not make the point articulated in the parenthetical. However, I assume that this omission
reflects nothing more than their desire to save space. In fact, even the statement in the parenthetical is
not quite accurate because the effect of introducing an additional imperfection on the amount of a par-
ticular type of misallocation will depend not only on the impact the relevant imperfection will have on
the absolute value of the aggregate distortion in the relevant choices’ profitability but also on any errors
the relevant choosers will make when evaluating the choices in question. KS seem to be fully aware of
this latter fact. See KS 1994 at 671 n.5 for a related point.

\(^\text{154}\) Indeed, KS deny the importance of this possibility in the sentence that follows the sentence that
articulates it: “[W]hen one approach entails an additional distortion that does not offset preexisting
distortions, then the approach that includes the additional distortion is less efficient. In the present case,
this is true, and this is what we proved in our prior papers.” KS 2000 at 824 n.5.

\(^\text{155}\) See Dagan, supra note 142.
giving full weight or more than full weight to the equivalent-dollar impact of their decisions on the relatively rich. If this were the only imperfection operating in our political-economic system, it would tend to cause government to make two types of economically-inefficient decisions:

(1) to execute economically-inefficient takings or pass economically-inefficient regulations that tend to harm the poor and benefit the rich rather than doing nothing; and

(2) to substitute less-economically-efficient takings and regulations that harm the poor and benefit the rich for more-economically-efficient takings and regulations that harm the rich and benefit the poor.

One way of deterring government from generating those sorts of inefficiencies—counteracting the imperfection in our political-economic system that generates them—would be to adopt a legal rule that entitles poor victims of takings or regulations but not rich victims of such government choices to compensation or that entitles poor victims of such policies but not rich victims to compensation in excess of their loss, to adopt liability-rules and/or damage-rules that make a party’s entitlement a function of his relative income/wealth position. At least, such approaches might succeed if government decision makers (e.g., administrative bureaucrats with limited budgets at their disposal) had to bear some of the costs these approaches would impose on their organizations (presumably, by having fewer resources to allocate to other policies).

Of course, these adjustments in legal rules would affect economic efficiency in a number of other ways as well. However, although I admit that...
the public-choice assumption on which this analysis is based is extremely crude, that many other imperfections are relevant to the analysis, and that many additional effects such as those I note only briefly in a footnote may be important, I suspect that on balance it may be economically efficient to adjust “takeings” entitlements and damage rules to make them reflect the income/wealth position of the victim of the “taking.”

KS also ignore another Second-Best-Theory-related reason why it may be less economically inefficient to redistribute resources from the richer to the poorer through extra-distortion-generating legal-rule adjustments than through tax policy—the possibility that the relevant addressees of the law may not be consumer sovereigns (i.e., may make certain errors). Like death and unlike accident and pollution losses, taxes are certain. This fact is relevant because there is some reason to believe that individuals tend to underestimate the probability of some types of uncertain events. If the addressees of the law underestimate the probability that they will be accident-or-pollution-loss injurers or victims, that fact could critically affect the relative economic inefficiency of redistributing income from the richer to the poorer through tax law and (say) by making the damages that tortfeasors and polluters must pay increase with their richness relative to the richness of their conduct of their rich victims (by making them feel victimized and increasing their social alienation)—i.e., by deterring crime or non-criminal antisocial acts and encouraging external-benefit-generating behavior on balance. Fifth, to the extent that these proposals increase (decrease) the amount of compensation government must pay to victims of its conventional and regulatory takings, it will increase (decrease) the amount of misallocation the government generates when funding such compensation.

159 Obviously, there are many reasons why KS may not have considered this type of economic-efficiency justification for making “legal rules” focus *inter alia* on the income/wealth position of a party. For example, as my colleague Neil Netanel suggested to me, their failure to advert to this possibility may reflect the fact that the redistributions from the richer to the poorer that they assume would be made through tax policy would reduce the political-economy imperfections whose presence the preceding analysis presupposed. In fact, for three reasons, I doubt this explanation has much force. First, KS repeatedly assert that their argument also applies to redistributions from the poorer to the richer. Second, KS never assume that the valued redistribution from the richer to the poorer would eliminate all differences in richness. And third, even if all material inequality were eliminated, the original rich would still have certain political advantages associated with their superior intelligence, articulateness, political savoir faire, connections, and ability to give public decision makers more-intrinsically-interesting work in their post-government-service years. Although this suspicion may not be justified, I suspect that KS’ failure to consider this type of possibility partly reflects the same lack of interest in political economy that was manifest in their treatment of the significance of the imperfectness of our actual tax law for the other sorts of decisions that “legislators” and “adjudicators” should make.

victims. In particular, even if the set of relevant actors would realize that the supra-compensatory-damages provision would apply to them, their tendency to underestimate their involvement in the relevant accident or pollution events:

(1) would reduce the amount of labor/leisure misallocation that a damages provision of this sort would cause by deterring both potential injurers and potential victims from engaging in economically-efficient labor below the amount of misallocation a tax law that secured an equivalent redistribution would generate in this way; and

(2) would reduce the amount of avoidance-related misallocation that the errors in question would cause potential injurers who realize that they are richer than their potential victims to generate.

Admittedly, such a damages rule might simultaneously increase the amount of avoidance-related misallocation that the errors in question cause potential victims who realize that they are poorer than their potential injurers to generate by increasing the inflation in the private profitability to them of not avoiding. However, one can certainly imagine plausible combinations of assumptions about the information-states of the law’s addressees and the law’s creators that would justify the latters’ concluding that the damages rule would be less economically inefficient than the tax rule that would yield an equivalent transfer from the richer to the poorer.

In Second-Best-Theory terminology, the relevant human propensity to make errors may produce this effect because it may counteract some of the extra distortions the legal rule will generate and may reduce the misallocation caused by some of the non-counteracted distortions that will be generated by both the legal rule and the distributionally-equivalent tax policy. It may be useful to elaborate on this second possibility. When discussing the Double-Distortion-Argument in Part II, I indicated that if the law’s addressees are sovereign maximizers (and risk costs can be ignored) the economic efficiency of their taxable-income-generating choices will be affected identically by a law that would cause them to pay X% of any additional “taxable income” they obtained in taxes and by a law that would cause them to pay X% of any additional “taxable income” they obtained in tort or contracts damages (or that reduced the tort or contracts damages they collected by X% of any additional taxable income they obtained). However, if the law’s addressees correctly perceived that the tax law in question would require them to pay X% of any additional taxable income they obtained in additional taxes but incorrectly believed that the tort-law or contract-law rule that would actually increase their ex ante legal liability by X% of any additional taxable income they obtained would increase their tort or contract liability by only (1/2)X% of any additional taxable income they earned (because they underestimated the likelihood that they would be
a tort-law injurer victim), the non-tax legal rule would cause its addressees to generate far less economic inefficiency when making taxable-income-generating choices than would the tax law because the legal rule in question would distort their perceived incentives to obtain more taxable income by far less than would the tax law even though the legal rule and the tax law would have the same distorting effect on their actual incentives to obtain additional taxable income.

Finally, at least arguably, KS ignore the possibility that a liability rule that makes a party’s liability (entitlement) or damages-obligations (compensation-entitlement) depend on his (earned) income or income/wealth position may be justified by the fact that the relevant party’s (earned) income or income/wealth position may be purely causally connected to the decision that is most economically efficient. The following example illustrates this possibility. Assume that a tortfeasor’s avoidance costs are not distorted and that the other sorts of private losses his victims sustained equal their allocative counterparts. In this situation, it will be economically efficient to require injurers who are liable to compensate their victims fully for the equivalent-dollar losses the victims sustained because the injurer inflicted pain and suffering on them or reduced their ability to gain pleasure or satisfaction from their leisure activities. But if one controls for the utility loss the victims sustained on these accounts, the equivalent-dollar loss they sustained will increase with their income/wealth positions because increases in their income and wealth will cause the marginal utility of money to them to decline and hence the number of dollars they will have to receive to offset their utility losses to increase. On the assumptions in question, then, there will be a “causal reason” for the economic efficiency of a damages rule that makes the compensation an entitled victim can recover a direct function of his income/wealth position.

IX. KS’ TREATMENT OF THE CORRELATIONAL/ADMINISTRATIVE-COST ARGUMENT FOR MAKING LEGAL RULES FOCUS ON THE EARNED INCOMES OR INCOME/WEALTH POSITIONS OF ONE OR BOTH PARTIES

As KS indicated in KS 2000, their 1994 article did not address what they refer to as “administrative costs”—i.e., the possibility (1) that the allo-

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161 I say “arguably” because, as I have already indicated, KS probably thought that their earned-income/wage-rate/private-cost-of-avoidance/(implicit) allocative-cost-of-avoidance example illustrated a causal rather than a correlational justification for concluding that such “legal rules” may be economically efficient.

162 See KS 2000 at 834 n.30.
cative administrative or transaction cost of determining a taxpayer’s earned income or income/wealth position in the tax-collection process might exceed the administrative cost of adjusting a legal rule to make it reflect something that is highly correlated with the relevant party’s earned income or income/wealth position; and (2) that the relevant allocative administrative-cost difference may be sufficiently big to make it economically efficient or desirable overall to substitute legal-rule adjustments for taxes or tax-collection efforts despite the fact that legal-rule adjustments will generate extra distortions and will redistribute income from the richer to the poorer or vice versa less thoroughly or systematically than will tax policy.

However, although KS’ 2000 response to Sanchirico admits that he could conceivably be right that these conditions will be fulfilled in individual instances and contains an inchoate economic correlation argument that assumes that those conditions are fulfilled, it (1) contends that he has failed to provide a “plausible” concrete example in which (allocative) administrative-cost considerations justify the conclusion that an otherwise-economically-inefficient adjustment in legal rules will redistribute resources between earned-income or income/wealth classes less economically-inefficiently and more desirably than tax policy; (2) expresses “skeptic[ism]” about the likelihood that such an example exists or can be found; (3) argues that doubts on this score are supported by the fact that public-finance economists who are aware of the possibility that Pareto imperfections not generated by tax law may significantly affect the economic efficiency of the taxes whose economic efficiency they are analyzing have chosen not to do empirical research into these imperfections; and (4) concludes the footnote in which they admit that their 1994 article did not “address administrative costs” with the unexplained assertion that administrative-cost considerations “would seem to be an important factor that weighs against using legal rules to attempt to redistribute significant amounts of income.”

163 KS do not note the difference between private and allocative administrative costs. This failure parallels their failure to note the difference between private and allocative avoidance costs. See supra text accompanying notes 135, 151 and Markovits, supra note 135.

164 A correct analysis would focus not only on the difference in cost but also on any difference between the accuracy of the de facto earned-income or income/wealth estimates on which the legal rule would base its outcomes and the accuracy of the direct estimates of earned income or income/wealth on which the tax decisions KS are commending would be based.

165 See supra note 164.

166 See KS 2000 at 832 and 832 n.24.

167 Id. at 833.

168 Id. at 834-45.

169 Id. at 835 n.30.
Since I am largely unfamiliar with the various sorts of sociological, psychological, and anthropological research (some of which may have been carried out by insurance companies) that might bear on the existence of correlations that could form the basis of an allocative-administrative-cost argument for the desirability of legislating income/wealth-position-oriented legal-rule adjustments\textsuperscript{170} to redistribute resources between or among earned-income or income/wealth classes and have done no such empirical research myself, I cannot provide the kind of plausible, concrete example KS are demanding. Although to some extent I do share their skepticism on this issue, like most lawyers I recognize the importance and possible unfairness of placing the burden of proof on the side one opposes. In part for this reason, after providing an example in which allocative administrative costs (defined to include the allocative and distributional cost of misestimates of the relevant parties’ earned incomes or income/wealth positions) might well have made it or (in some contemporary societies) might well make it less economically inefficient and more desirable to redistribute resources among earned-income or income/wealth classes by taxing something other than earned income or income/wealth, I will examine the implications of the failure of public-finance economists to do empirical research into various Pareto imperfections that are second-best relevant to the subjects they are investigating for the “practical”\textsuperscript{171} importance of the kind of correlational/administrative-cost argument Sanchirico made and KS’ 1994 article ignored.

A. A Highly-Stylized, Somewhat-Fictionalized Account of a Tax-Policy Adjustment That May Have Been Rendered Economically Efficient and Desirable by (Allocative) Administrative-Cost Considerations

Around 1700, the British government wanted to raise revenue by putting a tax on its subjects’ income/wealth. Unfortunately, it would have been very allocative-transaction-costly for the government to measure its subjects’ incomes and wealth directly. Fortunately, there was a high correlation between an individual’s income/wealth position and the number of windows in his home. The government therefore decided to substitute window taxes for income/wealth taxes. Admittedly, these window taxes caused more tax-distorted-behavior misallocation per dollar they transferred than would a direct income/wealth tax (since the window tax distorted not only the taxpayers’ leisure/market-labor/do-it-yourself-labor choices and savings/consumption/current-gift-giving/future-gift-giving/bequesting choices

\textsuperscript{170} That would not violate anyone’s moral rights.
\textsuperscript{171} See heading “B” of KS 2002 at 832—“Practical Implications.”
but also their choices as to how many windows to put or leave in their homes—note the bricked-in window-forms in many Queen Anne houses). Nevertheless, since it was less allocative-transaction-costly for tax collectors to count the number of windows in houses than to determine taxpayers’ incomes and wealth, it might well have been economically efficient and desirable overall from some legitimate personal-ultimate-value perspectives for the British government to make use of this window of opportunity by substituting window taxes for income/wealth taxes.

It may be that, in the contemporary United States, income and wealth are sufficiently measurable sufficiently cheaply for allocative-administrative-cost considerations to favor the economic efficiency and overall desirability of using taxes on income and wealth to redistribute resources between or among income/wealth classes. However, there is no reason to believe that this conclusion would apply to all countries even contemporaneously. For example, I am far from certain that it would hold in contemporary Russia, though I do not know what if any item could take the place of the residential windows in the British example.

B. The Accuracy and Relevance of KS’ Account of the Fact That Public-Finance Economists Have Not Found It Third-Best-Economically-Efficient or Desirable Overall to Do Empirical Research Into Pareto Imperfections Whose Execution They Know Would be Second-Best-Economically-Efficient

In KS 2000, KS make the following argument:

(1) in order to discover situations in which the sort of legal-rule adjustments Sanchirico is proposing will be rendered less-economically-inefficient and more desirable than tax policy by their allocative-administrative-cost advantages, one would have to do a substantial amount of empirical research;

(2) public-finance economists have chosen not to do empirical work on the non-tax-generated Pareto imperfections that they realize will affect the economic efficiency of the taxes whose efficiency they are investigating because they concluded that it would not be third-best-economically-efficient or third-best overall to do such research, given the inevitable cost and probable less-than-perfect accuracy of its execution and use;

172 Empirical research on any Pareto imperfection would be second-best-economically-efficient if it would be economically efficient if perfect data on the relevant parameters could be costlessly obtained and perfect analyses of the relevance of these imperfections for the economic efficiency of the choices under consideration could be costlessly executed.
(3) the fact that public-finance economists have concluded that empirical research on Pareto imperfections that would be second-best-economically-efficient to execute would not be third-best-economically-efficient or third-best overall to execute strongly favors the conclusion that it would also be economically inefficient and undesirable overall to do the empirical research one would have to execute for Sanchirico’s point to have any “practical implications.”

I have two objections to this argument. First, the kinds of empirical investigations one would have to execute to concretize Sanchirico’s proposal (e.g., studies of the allocative administrative cost of determining the correlation between such things as an individual’s accident-proneness and his income/wealth with different degrees of reliability and studies of the allocative administrative cost of estimating an individual’s income/wealth position with varying degrees of accuracy) are quite different from the empirical studies on Pareto imperfections that public-finance economists have chosen not to do. Since KS have given us no information about and I have little insight into either (1) the relative cost of studies of varying degrees of accuracy of the above two types or (2) the relative economic-efficiency or overall-desirability benefits of the information they would yield, I would be unable to assess the relevance of the conclusions KS allege public-finance economists have reached about the economic efficiency or overall desirability of doing research into the non-tax-generated Pareto imperfections that will affect the economic efficiency of the taxes whose economic efficiency they are analyzing for the economic efficiency or overall desirability of doing “Sanchirico research” even if I were willing to assume that the public-finance economists’ alleged conclusions about the third-best-economic-efficiency of the relevant Pareto-imperfection empirical-research were correct.

Second, I have little reason to believe that the failure of public-finance economists to do the empirical work on Pareto imperfections that would be second-best-economically-efficient reflects their appropriate analysis of the third-best-economic-efficiency of such research. Unlike KS, I am not a public-finance expert. However, my expertise in welfare economics, which

173 See KS 2000 at 833-34. In my terminology, a research choice would be “first-best-economically-efficient” if it would be economically efficient in a world that is otherwise Pareto-perfect; a research choice would be second-best-economically-efficient if the significance of all relevant Pareto imperfections could be determined perfectly accurately without incurring any cost and perfect data on the relevant Pareto imperfections could be collected costlessly; a research choice would be third-best-economically-efficient if it would be judged economically efficient on accurate assumptions about the cost and accuracy of the relevant theoretical work and data collection.
is highly relevant to public-finance research, makes me skeptical of this claim.

I am also an expert in antitrust economics and environmental economics, and I can assure you that the failure of IO economists and environmental economists to do empirical research into the myriad of Pareto imperfections that affect the economic efficiency of eliminating or reducing the particular Pareto imperfections against which the policy proposals they recommend are directed is not third-best-economically-efficient. More specifically, I am convinced that the failure of public-finance economists to do more research into the Pareto imperfections that currently cause our economy (1) to allocate too many resources from the perspective of economic efficiency to the production of quality and variety relative to the amount we allocate to the production of units of a less diverse, lower quality, less-quickly-supplied set of products or the execution of production process research; and (2) to allocate too many resources to the creation of quality and variety in some sectors of the economy relative to the amount of resources we devoted to such activities in other sectors of the economy—two types of misallocation whose magnitudes are substantially affected by tax policy—is not third-best-economically-efficient and that the IO and environmental economists who chose not to investigate these issues did not base their related empirical research decisions on anything like a third-best-economic-efficiency analysis.174

CONCLUSION

In a series of articles that have had substantial influence,176 Louis Kaplow and Steven Shavell have contended that an argument that economists denominate the Double-Distortion-Argument implies the following two propositions:

174 For a discussion of the reasons why economists in general have failed to respond properly to the General Theory of Second Best, see Richard S. Markovits, Second-Best Theory and Law & Economics: An Introduction, 73 CHI.-KENT L. REV. 3, 7-10 (1998). I recognize that neither this section nor its predecessor has dealt with what Sanchirico denominates “the haphazardness objection” to using private-law rules to effectuate the kinds of distributional norms that he and KS assume are in play. For an intelligent discussion of this objection (which, roughly speaking, focuses on the non-comprehensiveness of the redistributions private-law rules can effectuate), see Sanchirico 2001 at 1051-56, in which he points out, inter alia, that the breadth of the redistributive effects of tort-law-rule adjustments is substantially increased by liability insurance. Id. at 1052-53.

176 Westlaw indicates 77 citations to KS 1994 and 14 citations to KS 2000 but, in my experience, KS’ Double-Distortion-Argument argument has had far more influence than those citation counts suggest.
(1) except when creating or implementing “the income tax system—understood to include possible transfer payments to the poor” 177 (or presumably to any other group defined by its members’ richness/poorness), no public decision makers should ever make choices that would sacrifice economic efficiency in an otherwise Pareto-perfect economy to effectuate distributional norms that focus exclusively on the shape of the distribution of income as opposed to norms that focus at least in part on the placement of particular individuals in the relevant distribution (viz., norms that relate to “entitlement to payment based on desert” 178) unless a different conclusion is warranted by administrative-cost considerations or the political unavailability of the allegedly superior tax policy; 179 and, derivatively,

(2) no public decision maker who is in a position to create or apply legal rules—i.e., not only no “legislators” but also no “adjudicators”—should ever sacrifice economic efficiency by adjusting those rules to make the legal outcome depend on the incomes of the individuals to whom they relate when the adjustment in question would be economically inefficient in an otherwise Pareto-perfect economy.

Moreover, in the article in question KS proceed to denigrate each of the four qualifications their initial statement of the above two conclusions contains—the desert-norm qualification, 180 the otherwise-Pareto-perfect-economy qualification, 181 the administrative-cost qualification, 182 and the political-availability qualification. 183

The Double-Distortion Argument is correct. It demonstrates that, in an otherwise-Pareto-perfect world, if administrative-cost considerations do not

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177 See KS 1994 at 667.
178 See id. at 667 n.2.
179 See id. at 675 and KS 2000 at 834 n.30.
180 At least if the conclusion of many scholars that common-law judges in our moral type of society (in rights-based societies) are obligated to base their common-law torts and contracts decisions on a combination of the private-moral-duty-determining norms and the corrective-justice norms to which we are committed (despite the fact that one will sometimes have to sacrifice economic efficiency to instantiate such norms), KS’ claims that the Double-Distortion Argument implies the moral undesirability of judges’ making economically inefficient adjustments in tort law, see KS 1994 at 669-74, and in contract law, see id. at 674, denigrates the desert-norm qualification since the relevant corrective-justice norms are clearly “desert norms” in KS’ sense of this concept.
181 See KS 2000 at 824 n.5.
182 See KS 2000 at 834 n.30 (“administrative costs . . . seem to be an important factor that weighs against using legal rules to attempt to redistribute significant amounts of income.”).
183 See KS 1994 at 675, where they argue that the political unavailability of the allegedly superior tax policy should not induce the courts to try to generate a “significant” amount of the valued redistribution that the actual tax law failed to effectuate and ignore the possible implications of the deficiencies of actual tax law for the way in which “legislators” should resolve the various non-tax issues they must decide.
defeat this conclusion, one will have to generate less economic inefficiency to effectuate a given redistribution of resources between or among earned-income classes by making individuals pay taxes on their earned income than by making the legal liability of defendants (i.e., the legal entitlement of plaintiffs) or the damages (civil fines) that defendants held liable must pay (i.e., the compensation to which victorious plaintiffs are entitled) depend on their earned incomes (when doing so is not economically efficient) because the tax on earned income will distort the incentives to make only one kind of choice (i.e., the choice among leisure, different sorts of market labor, and do-it-yourself labor) while in an otherwise-Pareto-perfect world the economically-inefficient adjustment in such a legal rule will increase the distortion in the incentive to commit the act(s) to which the legal rule relates in addition to producing the same distortion in the relevant parties’ leisure/market-labor/do-it-yourself-labor incentives and will on that account cause more economic inefficiency than would the distributionally equivalent tax policy.

However, the correctness of this highly-qualified Double-Distortion Argument does not justify either the economic-efficiency conclusions or the prescriptive-moral conclusions that Kaplow and Shavell claim to derive from it. This Essay has shown that:

1. even if all the qualifications to the Double-Distortion Argument could be ignored, it would not justify the prescriptive-moral conclusion Kaplow and Shavell claim it warrants;
2. the various arguments that Kaplow and Shavell have made for ignoring the qualifications that the Double-Distortion Argument contains cannot bear scrutiny; and
3. those qualifications cannot in fact be ignored—indeed, they seem likely to substantially undercut the significance of KS’ Double-Distortion-Argument argument.

More specifically, my essay makes the following eight sets of criticisms of KS’ Double-Distortion-Argument articles:

1. KS stipulate a metric for “richness” that not only does not fit the ordinary-language sense of that concept but that defines the concept in a way that is alien to those who support a wide variety of egalitarian values that (roughly speaking) favor redistributions from “the richer” to “the poorer” in the sense in which these egalitarians understand those concepts;
2. relatedly, if an individual’s “richness” is defined in its ordinary-language sense to reflect his unearned income and wealth as well as his earned income (and a fortiori if it is defined in a way that may not correspond with ordinary usage to reflect an individual’s potential earned income, health, disabilities, consuming skills, enjoyment of labor, training,
and leisure, relational skills, and relationships), the variants of KS’s conclusions that are correct would be warranted not by a Double-Distortion-Argument argument as they claim but by an Extra-Distortion-Argument analog of the Double-Distortion-Argument argument (since, for example, the taxes on unearned income one would have to levy to redistribute resources among income classes as opposed to earned-income classes and the taxes on wealth one would have to levy to redistribute resources among income/wealth classes as opposed to earned-income or income classes would themselves generate two distortions—viz., would distort saving/consumption/current-gift-giving/future-gift-giving/bequesting incentives as well as leisure-market-labor/do-it-yourself-labor incentives);

3. (A) KS define “more economically efficient” inconsistently: in particular, KS sometimes define “more economically efficient” in the monetized sense and sometimes in the potentially-Pareto-superior sense of that expression;

(B) in claiming that the qualified Double-Distortion Argument demonstrates that (when the conditions implicated by the indicated qualifications are satisfied) tax policies will be potentially-Pareto-superior to their economically-inefficient legal-rule adjustment counterparts, KS mistakenly assume that the fact that a choice is “more economically efficient” than some alternative in the monetized sense of the enquoted expression is a sufficient condition for its being potentially Pareto-superior to that alternative; and

(C) KS incorrectly assume that, from all coherent and defensible value-perspectives, all moves to Pareto-superior positions will be morally desirable and appear to subscribe to the mistaken view that if the preceding proposition were true it would imply that all potentially Pareto-superior choices are morally superior to their potentially Pareto-inferior alternatives;

4. (A) KS underestimate the number or domain of decision-standards that belong in their category “desert norm” (to whose effectuation—they admit—the Double-Distortion Argument has no relevance); and/or (B) KS incorrectly believe that many, most, or all such norms are incoherent and/or indefensible;184

5. relatedly, KS ignore the facts that in our kind of rights-based State (in which a strong distinction is drawn between moral-rights discourse and moral-ought discourse and in which moral-rights conclusions trump moral-ought conclusions when the former conclusions conflict with the latter):

184 Admittedly, this latter criticism is based on their dismissal in KS 2001 of all “fairness norms”—a category that clearly includes many “desert norms.”
(A) both “legislators” and “adjudicators” may be morally
obligated to make economically-inefficient “redistributive” de-
cisions in relation respectively to prospective and actual tort-law
and contract law disputes that raise corrective justice issues; and

(B) that in a wide variety of cases “adjudicators” will be
morally obligated to (and from many value-perspectives mor-
ally-ought to) make decisions that have redistributive con-
sequences that KS’ argument demonstrates “legislators” should not
make—e.g., that adjudicators are morally obligated to apply
precedents that KS would find undesirable and that were inter-
nally incorrect when initially announced and to enforce legisla-
tion that “legislators” should not have promulgated;

(6) (A) KS fail to address the implications of the distributio nal
imperfectness of a given society’s actual tax laws for the way in which its
“legislators” should resolve issues whose resolution affects the instantiation
of the valued distributional norms that the society’s actual tax law effectu-
ated only imperfectly;

(B) KS fail to provide an argument for their contestable
conclusion that “legislators” in any society whose tax law is dis-
tributionally imperfect will reverse any attempt by “adjudica-
tors” to make economically-inefficient adjustments in legal rules
to effectuate to any significant extent the valued distributional
norms the relevant society’s imperfect tax laws failed to effectu-
ate fully;

(C) KS fail to delineate the philosophic and jurisprudential
predicates of their (to my mind, justified) suspicion that it would
be improper for courts to respond to such tax-legislation imper-
fections in this way; and

(D) KS fail to notice that the argument from impropriety to
which they allude would have important implications for the
moral legitimacy of their proposed solutions to many tort and
contract issues;

(7) KS’ discussion of the circumstances in which it will be economi-
cally efficient for an “adjudicator” to make a liability or damages decision
depend on the earned-income or income/wealth position of one or both
(sets of) parties to the litigation before him

(A) conflates the causal reason with the non-causal, correla-
tional reason why such an approach may be economically effi-
cient; and

(B) ignores both the second-best political-economy-related
reason and the second-best human-error reason why such an ap-
proach seems likely to be economically efficient in a significant
number of contexts; and
(8) KS’ conclusion that administrative-cost considerations favor using taxes rather than legal rules to effectuate to any significant extent the kinds of distributional norms on which they are focusing (i.e., KS’ dismissal of the practical importance of the non-causal-correlational/administrative-cost argument for adjusting legal rules to effectuate redistributions among classes defined by their members’ “richness”) 

(A) is not supported by any positive argument; and

(B) is not rendered more persuasive by the fact that public-finance economists have not chosen to do empirical research into the wide variety of Pareto imperfections whose presence, they realize, economic theory indicates will affect the second-best-economic-efficiency of the tax policies whose economic efficiency they are investigating.

I have nothing against economists’ analyzing the economic efficiency or relative economic inefficiency of particular legal rules or other kinds of government decisions or policies. Indeed, I devote much of my professional energies to doing just that. Moreover, I have no doubt that, in some situations, economic-efficiency conclusions are relevant to moral-rights, moral ought, and legal rights analysis. However, economists who execute “normative economic analyses” should not attach non-standard, misleading labels to various categories of moral norms, should acknowledge the possible importance of the distinction between moral-rights analysis and moral-ought analysis in the societies whose choices they are evaluating, should correctly apprehend the content of the moral norms that are implicated in these various types of analyses, should correctly assess these norms’ coherence and defensibility, should properly analyze the relationship between prescriptive-moral analyses of different kinds and the analysis of legal rights of different kinds in the societies whose choices they are considering, (more generally) should consider the structure and content of legitimate and valid legal argument in the society they are analyzing, and should pay heed to the possible distinction between the prescriptive-moral positions of “legislators” and “adjudicators” in the societies in question. Even if the concept “normative economic analysis” is not oxymoronic, normative economic analyses will be deficient if those who execute them label the relevant moral concepts misleadingly, misunderstand the content of the relevant moral norms, pay no attention to salient moral distinctions, and ignore or

misanalyze the role that various types of moral norms play in different sorts of policy and legal analyses. It would be not only ungenerous but also inaccurate to conclude that KS’ Double-Distortion-Argument articles manifest the truth of the old saying “to workers who possess hammers, everything looks like a nail.” But Kaplow and Shavell do exaggerate the number of nails in the system and fail to recognize that (to mix the metaphor) not everyone is authorized to perform the role of carpenter.

186 The reluctance of economists to face up to the importance of the philosophical and jurisprudential errors they make was manifest in the reaction to this manuscript of both a referee for the JOURNAL OF LEGAL STUDIES and the editor of that journal. Both rejected the manuscript on the ground that its criticisms of Kaplow and Shavell’s Double-Distortion-Argument articles were “marginal.”