

CHOICE, CONSENT, AND CYCLING: THE HIDDEN LIMITATIONS OF CONSENT

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INTRODUCTION

I. QUASI-LIBERTARIANISM AND THE PROBLEM OF CONSENT

If there is consent, a rape is no longer a rape, but lovemaking; a theft is no longer a theft, but a gift; a battery is no longer a battery, but surgery, or sports, or massage. A wrong, it seems, is no longer a wrong if the victim consents to it. That at least is the generally accepted view.

To be sure, there are some well-recognized exceptions. Consent does not count if coercion or deception is involved, if one of the consenting parties lacked competence, if there are good paternalistic reasons for overriding it (as there may be with drug use or euthanasia), or if what the parties are agreeing to would injure some third party (in which case we tend to call it a conspiracy). Consent might also be questioned if it involves selling something we think should not be commodified (like sex, bodily organs, or the services of a birth surrogate), or if it somehow arises out of an egregious inequality of bargaining power. But outside these by now fairly intuitive special circumstances, the generally accepted view is that consent should be honored. It is a view that is not fundamentally different from classic libertarianism, and so I will refer to it as Quasi-Libertarianism.

The Quasi-Libertarian view seems hard to resist. Other than the listed exceptions, there seem no good reasons left for not giving effect to someone's consent. My aim will be to expose such reasons—to show that the Quasi-Libertarian picture of consent is highly inaccurate, that it misses an important cluster of reasons for invalidating consent, reasons that often move courts but have never yet been properly articulated.¹

There is, as it turns out, a wide range of circumstances in which none of the familiar reasons for invalidating consent applies but in which one is rightly suspicious of consent and may well want to disregard it. Indeed in some such cases, often remarkably mundane ones, the suspicion is so deep-seated that even the most dyed-in-the-wool libertarians will blithely disregard consent without ever realizing what they are doing. In yet others, judges and scholars have realized that something is amiss, that there is something problematic about consent that is elusive and hard to identify. Typically judges have dealt with their unease by straining to assimilate such cases to the familiar exceptions.

The best example of such cases may be consent to risky activities—the “assumption of risk.” Assumption of risk is frequently disregarded either

1. Each of these recognized exceptions is of course a hornet's nest of difficult and unresolved issues. Among important recent explorations of these are: JOEL FEINBERG, *HARMLESS WRONGDOING* (1988); JOEL FEINBERG, *HARM TO OTHERS* (1984); BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998); MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); STEPHEN SCHULHOFER, *UNWANTED SEX* (1998); DETLEV STERNBERG-LIEBEN, *DIE OBJEKTIVEN SCHRANKEN DER EINWILLIGUNG IM STRAFRECHT* (1997); ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* (2003); ALAN WERTHEIMER, *EXPLOITATION* (1996); ALAN WERTHEIMER, *COERCION* (1987); PETER WESTEN, *THE LOGIC OF CONSENT* (2004). I believe, however, that implicit in all of these different accounts, indeed to varying degrees explicit, is a picture of the overall geography of consent like the one I have drawn.

because the risk-assuming party supposedly did not have a free choice, enough information, or the necessary competence, or because some vague and diffuse blend of concerns having to do with paternalism, commodification, or third-party effects supposedly requires it, although none of these in fact seems to really explain our discomfort with consent in such cases.² In addition, there are many other categories of cases in which a similarly hard-to-persuasively-explain discomfort with consent surfaces: it does so in our ambivalence toward victimless crimes (like drug use, prostitution, or assisted suicide even when engaged in by highly sophisticated, indisputably competent parties),³ our unease with tradeable pollution permits,⁴ our refusal to issue injunctions to enforce personal service contracts, and our bad conscience about the prevalence of plea bargains (and among some even about settlements).⁵ It also manifests itself in a range of peculiar but little noticed ways in which some of the core doctrines of the criminal and tort law override the wishes of all concerned parties.

How is one to explain these kinds of cases? How can one make sense of situations in which consent seems to fail but not on account of any of the usual suspects—coercion, deception, incompetence, etc.? That is the question this article seeks to answer. The gist of the answer I shall provide is that what lies behind our discomfort with consent in these cases has to do with cycling. *More precisely, the argument is that without limitations on consent, familiar criminal law and tort law doctrines are going to get us entangled in inconsistency-producing cycles, and while there are various ways of breaking those cycles, one of the least bothersome ways of doing so will turn out to be limitations on consent.*⁶

One's first reaction on learning that combining certain legal doctrines with consent leads to cycling is to think, "Well, so much the worse for those doctrines! They must be too rigid. They should probably be changed." But as we will see, the doctrines in question rest on such basic

2. See Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987) [hereinafter Simons, *Full Preference*]; Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481 (2002).

3. See, e.g., JOEL FEINBERG, *HARMLESS WRONGDOING* (1988); DOUGLAS HUSAK, *DRUGS AND RIGHTS* (1992).

4. Robert E. Goodin, *Selling Environmental Indulgences*, 47 KYKLOS 573 (1994).

5. On settlements and plea bargains, see Albert Alschuler, *The Changing Pleabargaining Debate*, 69 CAL. L. REV. 652 (1982); Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 103 (1986); Owen Fiss, *Against Settlements*, 93 YALE L.J. 1073 (1984). Discomfort with consent also surfaces outside the strictly legal domain. For the most notable examples, see Alan Gibbard, *A Pareto-Consistent Libertarian Claim*, 7 J. ECON. THEORY 366 (1974); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970) (to be discussed later in this article); see also JOHN BROOME, *WEIGHING GOODS* (1991); 2 FRANCES KAMM, *MORALITY, MORTALITY* 290–310 (1993). I made exploratory stabs in this direction in *Responsibility and Consent: The Libertarian's Problems with Freedom of Contract*, 16 SOC. PHIL. & POL'Y 94 (1999), and first made mention of the triage example at the heart of this piece in *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 180 (1996) [hereinafter KATZ, *ILL-GOTTEN GAINS*].

6. For an exceptionally user-friendly introduction to the social choice literature dealing with cycling, see PAUL E. JOHNSON, *SOCIAL CHOICE: THEORY AND RESEARCH* (1998).

and impossible-to-give-up ethical commitments (shared by nearly everyone whether they consider themselves libertarian, communitarian, Rawlsian, welfare economists, democratic socialists, utilitarians, or whatever else) that this way out will look exceedingly unattractive—less attractive even than disregarding the unanimous consent of all concerned parties.

My aim in this Article is explanatory, not normative. It is to show what it is about the criminal and tort law, and cognate doctrines elsewhere in the law, that leads them to limit the role of subjective preferences and consent, and how this in turn allows us to understand a variety of familiar and unfamiliar oddities not just in criminal and tort law but elsewhere. Even though my point is an analytical one, it does, however, have normative implications. After all, if one thinks that the ethical presuppositions on which an area of law is built are the right ones, then one is going to think the resulting limitations on consent a good thing. And since many other areas of law are built on similar presuppositions, similar limitations might commend themselves for those other areas as well. Indeed, I think what I have to say might shed some light on the longstanding controversy about unconscionable contracts and related conundrums of private law more generally. But that is not something I will pursue here.

A normative subject that I *will* pursue here are the implications my analysis has for the debate currently raging over the proper role of welfare economics in legal policymaking, the debate sparked by Lewis Kaplow's and Stephen Shavell's recent book, *Fairness versus Welfare*.⁷ Any analysis that casts doubt on the validity of consent, as mine does, also casts doubt on one of the welfare economist's most treasured assumptions—the Pareto principle. If we have reason to think that a transaction that all concerned parties would like to enter into should nevertheless be prohibited, then we are implicitly rejecting the Pareto principle, which says that anything that makes some people better off and no one worse off ought to be done. The authors of *Fairness versus Welfare* insist that the Pareto principle should be the lynchpin of all legal analysis and that all fairness-based legal theories should be cast aside because they one and all violate the Pareto principle. Later in this essay I will have occasion to tackle their thesis head on.

The way in which I will try to demonstrate my solution to the problem of the “hidden limitations of consent” is somewhat roundabout. I will begin, in Part II of this essay, by examining the problem in a very special, highly artificial context, involving triage decisions in an emergency room. I will show how in this very unusual context cycling can account for an otherwise hard-to-explain disregard of the subjective preferences and the consent of the affected parties. I will then, in Part III of this Article, apply the lessons of Part II to explain why consent fails in four familiar legal situations—namely, some of the ones I already mentioned: the rejection of the assumption-of-risk defense, the creation of victimless crimes, the refusal to enforce personal service contracts by specific injunction, and the general wariness toward tradable pollution licenses and analogous means of environmental

7. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2000).

control. This list is obviously not exhaustive of all situations in which consent inexplicably fails, but it is a fair sample from which the reader may then extrapolate. Finally, in Part IV, I will look at the way my thesis affects the newly ignited debate about the relationship of welfare economics and the law.

II. A SPECIAL INSTANCE OF THE PROBLEM AND OF ITS SOLUTION

A. *A Case of Triage*

I will begin my exploration of the hidden limitations on consent by considering a case of triage in an emergency room. This must seem like a strange place to start. Although a wrong triage decision by a doctor might conceivably, under the right circumstances, qualify as a crime or a tort, it usually will not. My reason for considering it nevertheless is that it serves to bring out with exceptional clarity certain features that are buried well beneath the surface of more quintessentially “legal” cases. What I propose to do is to look at more traditional criminal and tort law problems through the lens of this triage example.⁸

Dudley is an actor who likes to play the piano. Although piano playing is not crucial for his professional success, it is a great passion with him. One day Dudley is involved in an accident. He is basically uninjured except for some slight damage to one of his pinkies. Being such a passionate pianist, Dudley is worried about even the slightest impairment of his manual dexterity. He therefore decides to seek out the nearest emergency room to have his pinkie taken care of. There is exactly one doctor on duty but luckily no other patient competing for his attention. Dudley’s pinkie is about to get the promptest attention—until very suddenly, another patient is wheeled into the ER. This patient, let us call her Silvia, has a much more serious injury: her leg has been badly mangled and, unless she is immediately attended to, she might well permanently lose the use of that leg. Needless to say, the doctor immediately decides to redirect his attention from Dudley to Silvia.

I take it no one would want to quarrel with the doctor’s decision—except maybe Dudley, but not for any good reason. Or am I perhaps wrong about that? What if Dudley were to argue as follows: “I happen to know that Silvia is a perennially depressed poet. Whether her life is going well or poorly, she is depressed. If she loses her leg, she will be miserable. But she would be miserable anyway. Indeed one of these days I’m convinced she will commit suicide. To me, however, the ability to play the piano makes all the difference in the world. If I lose even an iota of my manual dexterity and my piano playing deteriorates as a result, I too will be miserable. But I would not be otherwise! You would therefore do more for human happiness by first attending to my needs rather than hers.” This argument would not of course persuade. But the fact that it would not persuade is something worth noticing. It means that the doctor is not supposed to give priority to the

8. I first made mention of this example in KATZ, ILL-GOTTEN GAINS, *supra* note 5.

happy pianist over the unhappy poet despite the fact that doing so would maximize overall contentment.⁹ The poet's claim to the doctor's services trumps the pianist's claim, despite the fact that she stands to benefit far less in terms of happiness than the pianist. A claim to be protected against the loss of a leg is judged by us to be stronger than a claim to be protected against the possible slight loss of some dexterity in one's pinkie. The strength of that claim appears not to depend on the amount of happiness produced by its fulfillment.

Now let's continue to unfold the story. Just as the doctor is about to look after Silvia's leg, something peculiar happens. Dudley discovers that he has actually suffered more of an injury during the accident than he noticed at first. In addition to the damage to his pinkie, there was also some harm to his legs. Indeed, it is just now becoming clear that unless his legs are immediately looked after, he stands to lose the use of *both* of them. He brings this to the attention of the doctor. The doctor readily acknowledges that a two-leg injury trumps a one-leg injury and that, in light of this new development, Dudley regains his priority over Silvia. But as the doctor is about to start treating Dudley's leg injuries, Dudley tells him that he would rather the doctor first dealt with his pinkie. Dudley explains that his hands are more important to him than his legs because they are so crucial to his piano playing. If having his pinkie treated means he might possibly lose the use of his legs, he says, "so be it."

What should the doctor do? It seems hard to resist the idea that he should acquiesce in Dudley's request. *After all, it's Dudley's body!* If Dudley prefers to have his pinkie treated rather than his legs, is that not his business? No one is harmed if the doctor so acts, except perhaps Dudley, who does not think he would be harmed, and therefore, if we credit Dudley's subjective preferences, really is not.

On seeing the doctor start to treat Dudley's pinkie, however, Silvia registers a protest. "How can you give his pinkie priority over my legs? I understand that his two legs have priority over my one leg, but his pinkie does not. The fact that he also has a two-leg injury that trumps my one-leg injury just seems irrelevant as long as he is not having it treated." To underscore her point, Silvia then offers an analogy. "Imagine the following. Suppose that what the pianist really wanted was neither to have his legs nor his pinkie treated but just to play a game of checkers with you—that's right, a game of checkers, with you, the only doctor on duty!—from which treating my leg injury would take you away. He says to you that if you don't play checkers with him, he is going to insist on your treating his legs, but one way or another, you are not going to get to treat *my* leg. Would that lead you to play checkers with him and thus not treat anyone at all? Isn't the pinkie in this case pretty much the equivalent of a game of checkers?"

Silvia surely has a point. It does seem strange to give the pinkie priority over something as serious as the possibility of losing a leg altogether,

9. That is, even if we accept Dudley's controversial assumption about the possibility of making interpersonal utility comparisons, the utility argument would not persuade.

regardless of the presence of that untreated two-leg injury. And even if the strangeness of doing so does not immediately seem apparent, it certainly should once we consider the absurdity that Silvia's analogy involving the game of checkers reveals.

This is the "triage cycle" (sometimes I call it the "Original Triage Cycle," in contrast to some others later on) around which the rest of this article is built. The doctor has seemingly compelling grounds for giving Dudley's two-leg injury priority over Silvia's one-leg injury. He also has seemingly compelling grounds for respecting Dudley's desire to have his pinkie treated ahead of his legs. And he has seemingly compelling grounds for treating Silvia's one-leg injury ahead of Dudley's pinkie. But which is it to be? We are in a cycle. How do we break it?

B. *The Components of the Cycle Reconsidered*

One of the steps in this cycle has to be rejected. At least one of the three priorities argued for has to yield: either the two-leg injury should not win out over the one-leg injury, or the pinkie should not win out over the two-leg injury, or the one-leg injury should not win out over the pinkie. But which of these three priorities is in fact the *least* compelling?

It will help to give each of the three steps in cycles of this sort a name. Let us call the first step, by which we grant the pianist's two-leg injury priority over the poet's one-leg injury, the Basic Priority Argument. This is the step in the cycle that seems hardest to quarrel with. A two-leg injury is more serious and hence more deserving of treatment than a one-leg injury, and thus the priority of a two-leg injury over a one-leg injury seems like a very basic one.¹⁰

10. Some readers have wondered whether in making the judgment that a two-leg injury is worse than a one-leg injury I am not simply smuggling in some kind of objective welfare judgment. Why is it, they ask, that I automatically assume that Dudley's two-leg injury is more serious than Silvia's one-leg injury when it seems logically quite possible that Silvia derives more utility from her one leg than Dudley does from two? It must be, they say, because I think that any two-leg injury is "objectively" worse than a one-leg injury, regardless of how the victim judges the matter. But if I am relying on objective welfare judgments, they imply, then it is unremarkable that in intermixing such objective welfare judgments with subjective welfare judgments (like Dudley's ranking his pinkie above his two legs), we should end up in a cycle.

I am not, however, relying on any objective welfare judgments here. I do not assume anything about the comparative welfare of Silvia and Dudley when I assert that he has more of a claim to help with his two-leg injury than she does to help with her one-leg injury. There is no particular connection between claims and welfare. Talking about claims is not just a roundabout way of talking about welfare. To see this more clearly, note that it will often happen that Person A has a stronger claim to something than Person B, but B would derive greater welfare from it (whether assessed objectively or subjectively) than A. The simplest example of this are claims to property. Obviously, Person A may have a stronger claim to a piece of property than Person B by virtue of the way in which he acquired it (perhaps it is the fruit of his own labor), despite the fact that it would do more for B's welfare if he were to own it instead of A. In a later section in which I discuss the logic of claims more extensively, I will offer other examples of how comparing the strength of claims has little to do with comparing welfare or utility.

It is an important feature of my argument that I am not relying on any ideas about objective welfare, since many people find such ideas eminently resistible. What I say about claims, by contrast, seems much harder to resist.

We will call the next step in the cycle the Pareto Argument. This is Dudley's argument that since he prefers to have his pinkie treated rather than his two legs and since Silvia is in no way harmed thereby, the doctor should redirect his attention to the pinkie. In slightly more colloquial terms, Dudley is saying: "What's it to Silvia whether I have my legs or my pinkie treated? Silvia is not going to get her leg treated either way. If I can't get my pinkie treated, I will simply insist on having my legs treated. And what would Silvia get out of *that*?" In more technical terms, he is arguing that treating the pinkie rather than the two legs is the Pareto-optimal thing to do. Many people, probably most, will find the Pareto Argument irresistible. How could one possibly object to something that benefits one person and does no harm to another?¹¹

The final step in the cycle is the one by which Silvia hopes to regain her priority. This is Silvia's argument that it is outrageous for Dudley's pinkie to be treated ahead of her leg. Let us call this the Regained Priority Argument. The objection most people would raise to the Regained Priority Argument would probably be something like this: "Dudley has a rightful claim to have his two-leg injury treated ahead of Silvia's one-leg injury. He has chosen to give up that rightful claim for another claim, namely to have his pinkie treated instead. That surely is his prerogative. But then there is nothing really unfair about giving his pinkie priority over Silvia's leg, even though, looked at superficially, it seems callous."

On reflection this way of dismissing the Regained Priority Argument starts to look less and less persuasive. What is being overlooked is a vital conceptual distinction that is both crucial and easily missed. The distinction is one that has only recently attracted the attention of moral philosophers and economists and whose full ramifications for a wide variety of issues are still being worked out. It is the distinction between *claims* and *desires*, or as it is sometimes put, between *interests* and *preferences*. Once that distinction is fully digested, it becomes much harder to reject Silvia's Regained Priority Argument. Let us see why.

The idea behind the distinction and its connection with our cycle are best conveyed with an example. Suppose a friend asks you for financial help with a dental treatment he cannot afford. You might be perfectly willing to help him out. But suppose that after you have given him this assurance, he tells you he would much rather use the money you offered him to do something else instead, which he thinks will make him happier—say, go on a cruise—and forget about the dental treatment. My guess is that you would balk and rescind your offer of help. But just exactly why are you balking? Is it because you think it frivolous to spend money on a cruise? That can't be the reason, since you would balk similarly if he had asked to devote the money not to a cruise but to his church's charity. Perhaps you are balking because you think he will regret going on the cruise when he comes back and is still stuck with his bad teeth. That can't be the reason either, since you would balk similarly if he spent the money on something durable, like a

11. See KAPLOW & SHAVELL, *supra* note 7, 54–56.

gold watch, and never regretted the tradeoff. Are you perhaps balking because you do not really believe that he will get more pleasure from a cruise than from improved teeth? But you might well believe him and still not feel impelled to finance his cruise. In all likelihood, you are balking quite simply because you feel morally somewhat obliged to help with dental treatment but much less so with regard to a cruise. You feel that your friend has a strong moral claim on you with regard to dental treatment but that he has a much weaker moral claim with regard to a cruise, despite the fact that his desire for dental treatment is much weaker than his desire for a cruise.¹² This illustrates an interesting property of claims and desires: the fact that your friend has a claim to something you could give him on the one hand and a strong desire for something else you could give him on the other does *not* give him a strong claim to that other thing as well. Exactly why that is so, I will have a bit more to say about shortly, but that it *is* the case should seem reasonably intuitive.

We are now able to see the real strength in Silvia's argument that she regains her priority over Dudley when he redirects the doctor's attention from his legs to his pinkie. Silvia is saying that even though Dudley's claim to getting his legs treated is stronger than Silvia's to getting her one leg treated and even though Dudley would much prefer to have his pinkie treated instead, it does not follow that his claim to getting his pinkie treated is stronger than her claim to getting her leg treated. Dudley's claim to getting his two legs treated is like your friend's claim to getting his dental problem treated. Just as your friend cannot transmute his claim for help with a dental treatment into a claim for help with a cruise, Dudley cannot transmute his claim for help with his two-leg injury into a claim for help with his pinkie.

If Silvia is right, then the step in the cycle that ought to be rejected is the second one—the Pareto Argument. Despite the fact that treating Dudley's pinkie makes him better off without making Silvia worse off, the doctor ought not to treat Dudley's pinkie. But is Silvia right? We will turn to this in the next Section.

C. A Closer Look at the Pareto Argument

In the previous Section we saw one argument against the Pareto Argument, namely that it is a characteristic feature of claims that they don't conform to the Pareto principle. Or to put the matter a little more elaborately: when comparing Silvia's claim to restoring her leg with Dudley's claims to restoring his two legs or his pinkie, we saw that such a comparison does not depend on the happiness each derives from the use of those organs. In other words, their claim to treatment does not depend on the intensity of their desire for such treatment. That is how it is with claims generally. A strong desire for something does not necessarily imply a strong claim to it.

12. Some people might find this example more convincing if what your friend wanted to do was not something as frivolous sounding as a cruise but something more "heroic," like climbing Mount Kilimanjaro.

Unavoidably implicit in this disregard of desire is our disregard for Dudley's comparative preference between his legs and his pinkie.¹³

Yet another argument Silvia might make has to do with timing. She might say: "Suppose that I had only been brought into the ER after Dudley had already passed up the chance to get his legs treated and was having his pinkie treated instead. Surely the doctor should switch from treating Dudley's pinkie to attending to my one-leg wound instead. Now notice that at this point Dudley is no longer in a position to stop the doctor by saying that if he does not continue to treat his pinkie, then Dudley would insist that the doctor treat his two-leg injury. But do we really think that whether Dudley gets his pinkie treated or not should turn on whether at the moment at which I am delivered to the ER, the treatment of his two-leg injury is still a live possibility?"

Finally, there is a third argument that Silvia can make against letting Dudley have his way. This is in some ways the strongest argument against the Pareto Argument and in favor of the Regained Priority Argument. It involves constructing a more elaborate cycle than the one we have dealt with so far, one in which each of the steps is even more obviously compelling than the Regained Priority Argument, and in which it is therefore even harder to do anything other than reject the Pareto step of the cycle.

I am going to construct this cycle with the help of the so-called "necessity defense," the doctrine whereby someone is justified in committing a crime, provided there are sufficiently compelling circumstances. One example would be if the crime is a comparatively minor one and the reason for committing it has to do with saving lives.¹⁴ A fairly standard instance of this is the stranded hiker who breaks into a cabin because that is his only way of avoiding certain starvation. Consider, then, the following variation of the standard necessity case: Two friends, Doc and Dudley, are mountain climbing when they run out of food and water. Doc is clearly strong enough to make it back off the mountain, but Dudley, much weaker than Doc, might not make it. Luckily they come across an apparently well-stocked mountain cabin, which, as it happens, belongs to someone named Silvia. Doc is about to break into the cabin in search of supplies. Just before he does, Dudley says to him: "Given all the effort we have already invested in this, I would be loath to turn back before we have reached the top. Let's just take what we

13. Some readers might find the following variation on the foregoing argument illuminating. The doctor might reason to himself as follows: "What is the cost of not acceding to Silvia's claim to have her one-leg injury treated? Is it that I cannot treat Dudley's two-leg injury, or is that I cannot treat Dudley's pinkie? It cannot be both, since I could not possibly treat both. Well, let us say, I regard the inability to treat the one-leg injury as the cost of treating the pinkie. Then I clearly should go ahead and treat the one-leg injury, since Silvia's claim to her leg is stronger than Dudley's claim to his pinkie. Now let me try the alternative supposition on for size. Let me suppose that I regard the inability to treat Dudley's two-leg injury as the cost of treating Silvia's one-leg injury. Then, of course, I should decline to treat the one-leg injury, since Dudley's claim is clearly superior to Silvia's. But in that case what I ought to do is to treat the two-leg injury. If I do not, then why am I considering it (rather than the pinkie) as the cost of treating the one-leg injury? *Either way I should not be treating Dudley's pinkie.*"

14. MODEL PENAL CODE § 3.02 (1962)

find and proceed onward. I'll take my chances on getting back down." Doc nods in agreement. He then proceeds to break into the cabin and helps himself to whatever supplies he can find.

We now have another version of the familiar triage cycle. Let us see why. Doc here faces three possible courses of action.

Alternative (1): He could choose *not* to break into the cabin and simply try to get Dudley back down the mountain, hoping for the best.

Alternative (2): He could break into the cabin, get the necessary supplies, and thus make sure they make it back safely.

Alternative (3): He could break into the cabin, get the supplies, and use them to continue his climb with Dudley.

Let's consider the choice between (1) and (2). Obviously Doc is permitted to choose to break into Silvia's cabin if that is necessary to save Dudley's life. In other words, it seems clear he is permitted to choose (2) over (1). That is the idea behind the defense of necessity.

Consider next the choice between (2) and (3). Both Doc and Dudley would prefer to use the supplies from Silvia's cabin to try to continue their climb and take their chances on getting safely back down. Since the effect on Silvia is the same either way and they would prefer this outcome, it seems they should be free to choose (3) over (2).

Finally, consider the choice between (3) and (1). Silvia will protest that she can see having her cabin raided for the sake of ensuring a safe return down the mountain, but not for the sake of continuing a daredevil attempt to reach the peak. That argues for choosing (1) over (3).

Thus far we have simply recreated the Original Triage Cycle. Breaking into the cabin corresponds to switching treatment from the poet's one leg to the pianist's two legs. (It is just another version of the Basic Priority Argument.) Using the proceeds to prolong the hike corresponds to switching treatment from the pianist's legs to his pinkie. (It is just another version of the Pareto Argument.) And desisting from breaking into the cabin altogether corresponds to switching treatment from the pianist's pinkie back to the poet's one leg. (It is another version of the Regained Priority Argument.) I would argue that the *least bothersome way* to resolve the cycle would be to prohibit the move from (2) to (3), that is, to reject the Pareto Argument. In other words, we ought *not* allow the defendant to argue: "I could have claimed the cabin owner's property so as to get my friend off the mountain; and I have chosen to exchange that right for the right to use the cabin owner's property to prolong our climb."¹⁵

15. There is one subtle difference between this and the triage cycle that is worth noting, though it does not change the basic character of the problem: The move from (1) to (2) is obligatory in the triage context, but merely permissible here. As between treating the poet's one-leg injury and the pianist's two-leg injury, the doctor is obligated to do the latter. As between not breaking into the cabin and breaking into the cabin so as to be able to bring his friend down the mountain safely, the defendant is *permitted* but not obligated to do the latter, because crimes committed out of necessity are permissible but not obligatory.

Now let us complicate the picture a little. Let us suppose there is a second cabin nearby. It contains the supplies and equipment necessary for prolonging the climb but will do nothing to enhance Dudley's ability to make his way back down the mountain. As it happens, breaking into that second cabin would do considerably less damage than breaking into the first cabin. What should Doc do? We now get another cycle, more interesting and illuminating than the Original Triage Cycle. In connection with this cycle, it is much, much harder than before to resist the inference that Dudley's preferences ought to be overridden.

Doc's menu of choices includes the following four alternatives:

Alternative (1): He could choose *not* to break into any cabin and simply try to get his friend back down the mountain, hoping for the best.

Alternative (2): He could break into Cabin 1 and use the garnered supplies to get his friend safely down the mountain.

Alternative (3): He could break into Cabin 1 and use the supplies he finds to continue the climb.

Alternative (4): He could break into Cabin 2 and continue the climb. If he did this, he would do less damage than if he broke into Cabin 1. Of course, the supplies he would find there could only be used to prolong the climb.

Again, let us consider the possible choices in pairs. How should, or could, Doc choose when deciding between Alternative (1) and Alternative (2)? The defense of necessity would allow him to break into Cabin 1 if that is what is necessary to get his friend back down the mountain safely, suggesting he is free to choose (2) over (1). This is just the familiar Basic Priority Argument.

Now consider the choice between Alternative (2) and Alternative (3). The reasoning is the same as before. Whether he follows Alternative (2) or (3), Doc is breaking into Silvia's cabin and doing an equal amount of damage to her cabin and her supplies. But in Alternative (2), he uses the supplies to get back home, and in Alternative (3), he uses them to do what both he and Dudley would prefer, to prolong the climb. Since doing the latter does no additional harm to Silvia and is preferred by Doc and Dudley, it seems they should be free to choose (3). It is the Pareto-optimal thing to do. In other words, this is just the Pareto Argument.

Consider next Doc's choice between Alternative (3) and Alternative (4), namely breaking into Cabin 1 or breaking into Cabin 2. This is where things get interesting. Either cabin would yield him what he and Dudley want, the supplies necessary to prolong their climb. Cabin 2 is not nearly as useful as Cabin 1, however, for making an immediate descent back down the mountain. Since Cabin 2 involves doing less damage to someone else's property than Cabin 1 while still providing them with all they want, it seems that Doc should break into Cabin 2 instead. In other words, he should be required to choose Alternative (4) over Alternative (3). This is essentially another version of the Basic Priority Argument.

Finally, consider Doc's choice between Alternative (4) and Alternative (1). Should he break into Cabin 2 so as to be able to prolong his climb or not break into any cabin and simply try to get down the mountain with his friend? Breaking into Cabin 2 so as to prolong the climb is not what the necessity defense is usually taken to justify. The fact that breaking into Cabin 2 would yield them great utility obviously does not give them any great claim to do so. Intense desire is not the basis for a valid necessity claim. He should therefore be required to choose (1) over (4). This too is just another version of the Basic Priority Argument. Given the choice between breaking into a cabin so as to prolong a climb and not breaking into it at all, the latter deserves priority. This gives us yet another cycle.

So how do we break this cycle? Again, I would suggest that the step in the cycle that we will find most tolerable to give up is that between Alternative (2) and Alternative (3). To give up on that step is to tell Doc that he may not exchange his right to break into the cabin for the sake of getting down the mountain, for a right to break into that same cabin to prolong the climb. To be sure, this seems awkward. It is odd that he cannot do something that would not hurt Silvia, yet would benefit both him and Dudley. But what other solution do we have?

What is interesting about this more complicated version of the triage cycle is that the need to override Dudley's preferences seems so much more compelling here. Even those who hesitated in the Original Triage Cycle will find it very difficult to accept the consequences of not rejecting the Pareto Argument in this case. If we did not block the move from Alternative (2) to Alternative (3), we would have to avoid the cycle by blocking one of the other steps in the cycle. But notice how much more objectionable that would be. To block the move from Alternative (1) to Alternative (2) (break into Cabin 1 rather than not break into either cabin), we would have to reject the defense of necessity. To block the move from alternative (3) to Alternative (4), we would have to permit Doc to inflict more damage than is necessary to attain his objective of prolonging the climb. To block the move from Alternative (4) to Alternative (1), we would have to allow the defense of necessity to be invoked whenever someone has a sufficiently intense desire for something. In other words, we would have to say that if breaking into Cabin 2 is what is required for Doc and Dudley to fulfill their dream of getting to the top of the mountain, then they are entitled to do it. We are thus stuck with blocking the move from Alternative (2) to Alternative (3): Doc may not use what he finds in Cabin 1 for the purpose of prolonging the climb even though that would be the Pareto-optimal thing to do.

My purpose in constructing this more complicated cycle was to create an example in which the most controversial step in the Original Triage Cycle, the Regained Priority Argument, is replaced by two much less controversial steps, the two new versions of the Basic Priority Argument, the moves from (3) to (4) and from (4) to (1). Because these Basic Priority Arguments are so much harder to resist than the Regained Priority Argument, the case for rejecting the Pareto Argument has grown that much stronger. Strictly speaking, the fact that the Pareto Argument fails in the context of

this new cycle does not establish that it also fails in the Original Triage Cycle, but it certainly makes that possibility much harder to resist.

D. *Implications for Consent*

What we have seen thus far is that in the context of my highly artificial Original Triage Cycle (and its close cousin, the “necessity cycle”), we can most plausibly avoid a cycling problem by giving up on the Pareto Argument. I have not said anything so far about consent, but it should not be surprising that a rejection of the Pareto Argument should have some immediate implications for consent. What are those implications?

To begin with, note that by rejecting the Pareto Argument in the Original Triage Cycle—by not allowing Dudley to get his pinkie treated instead of his legs—we are invalidating someone’s consent under circumstances in which none of the usual reasons for invalidating consent applies. There is no force or fraud involved; there is nothing that impairs Dudley’s ability to competently decide; there are no third-party effects; he is not selling anything uncommodifiable, etc. Nevertheless, we treat his right to have his legs treated as inalienable: we do not allow him to alienate it in exchange for getting his pinkie treated. We have here, then, a first counterexample to the Quasi-Libertarian view of consent, namely a situation in which none of the usual reasons for invalidating consent is present but in which we are nonetheless strongly inclined to find consent invalid.

But the Original Triage Cycle harbors within it another counterexample to the Quasi-Libertarian view, one that will help us see how a rejection of the Pareto Argument in the Original Triage Cycle is going to lead to the invalidation of consent more generally. Let us suppose that Dudley were to ask Silvia for her permission to get his pinkie rather than his legs treated, perhaps by promising her some money in return. If Silvia consented, would her consent be effective? According to the Quasi-Libertarian view, it ought to be, since there was no force, no fraud, nor any other generally accepted consent-impairing feature present. Nevertheless, we shall see that in contradiction to the Quasi-Libertarian, such consent would probably not be effective; or rather, that if we were to deem it effective, we would then be stuck with all kinds of unpalatable implications. Let us see why.

When we ask whether consent is effective, we usually just have in mind whether the consenting party will be entitled to complain despite her consent. In other words, can she still sue for damages? For that matter, can the state still charge the perpetrator with a crime? But there are other, slightly more indirect and easily overlooked ways in which consent can be effective or ineffective, and it will be useful to consider those others before we consider whether it is effective in the most direct and obvious way, namely by denying her the right to complain afterwards. What are these indirect and easily overlooked effects of consent? Broadly speaking, they are the following: if we were to give full effect to Silvia’s consent, it would presumably mean that she would be successfully transferring to Dudley a variety of rights and privileges she holds in regard to her legs. More precisely, it would

mean that Dudley would henceforth be able to claim for the sake of his pinkie all the rights and privileges Silvia used to be able to claim for the sake of her leg. But is that in fact what will happen as a result of Silvia's consent? Let me list a few rights and privileges that quite clearly will not have been successfully transferred from Silvia to Dudley.

First, Silvia's consent will not have the effect of alienating her *self-help rights with respect to her leg*. What I mean by that is this: If someone's legs (or any other part of his body) are threatened with serious injury, he may use potentially deadly force to defend himself. By contrast, if someone's pinkie is threatened with an injury that might result in some slight loss in dexterity, he presumably would not be able to use such force. Now notice that *if Silvia's consent were fully effective, then the amount of force that Dudley could henceforth use to defend his pinkie would be identical to that Silvia previously was entitled to use to defend her leg.*¹⁶ And yet, quite clearly, he will not be able to do so. To be sure, he will be able to use some measure of forcible self-defense to protect his pinkie from an attack. But the amount of permissible force will be limited to the level we deem appropriate for defending a pinkie, as opposed to the level appropriate for defending a leg.

Second, Silvia's consent will not have the effect of alienating her *due-care rights with respect to her legs*. What are due-care rights? Everybody is entitled to a certain amount of care, effort, and expenditure from others to avoid being injured by them. In turn, everyone is entitled to engage in a variety of activities that impose some non-zero measure of risk on others, as long as it is not excessive. Of course, the amount of care that may be expected from others and the amount of risk that may be imposed on others will vary. They will depend on the stakes. If what is at stake is the loss of a leg, things will be different than if it is merely a pinkie. Everyone is entitled to a more substantial effort from others to avoid being subjected to a major injury than merely to avoid being subjected to a minor injury. In turn, everyone is permitted to impose a much more substantial risk of injury on others if he needs to do so to avert the major calamity of losing his leg than if he is merely seeking to avert the more minor mishap of having his pinkie injured. Those are his due-care rights.¹⁷

Now observe that Silvia is no more able to alienate her due-care rights, than she is able to alienate her self-help rights. In other words, she cannot by her consent enable Dudley to claim from others on behalf of his pinkie the level of precautions she, Silvia, could previously claim on behalf of her leg; nor can she enable him to impose on others on behalf of his pinkie the level of risk she herself could previously impose on behalf of her leg.

16. Someone might well exclaim: "Well, of course she can't transfer her due-care rights. After all, other people than she and Dudley have a stake in this, namely the people who will be imposed upon for the sake of a pinkie rather than a leg." But it hardly seems a matter "of course" if we imagine that Dudley will impose on them for the sake of his pinkie exactly those risks Silvia would have imposed on them for the sake of her legs. In any event, for our purposes here, all that is necessary is that we all agree on the bottom line, namely that Silvia's consent will in fact not be capable of transferring her due-care rights.

17. See MODEL PENAL CODE § 2.02(2)(c)-(2)(d) (1962).

Third, Silvia's consent will also not have the effect of alienating her *necessity and duress rights with respect to her legs*.¹⁸ Both the defense of necessity and the defense of duress allow a defendant to commit certain crimes if necessary to avert some other sufficiently great misfortune. The greater the misfortune being averted, the more serious the crime one may commit to avert it. If Silvia were faced with a threat to her leg, there would thus be some serious crimes she would be permitted to commit to avert that threat. By contrast, if someone is merely faced with the threat of a little harm to his pinkie, the seriousness of the crime he may commit is significantly lower.

Now realize that Silvia will be as unsuccessful in conveying her necessity and duress rights to Dudley as she is in conveying her self-help rights and her due-care rights. In other words, she is not able to make it possible for Dudley to commit all the crimes on behalf of his pinkie that she herself would have been able to commit on behalf of her leg.

Fourth, Silvia's consent will not have the effect of alienating her *compensation-related rights with respect to her leg*.¹⁹ If Silvia were to seek compensation from a putative tortfeasor for injuring her leg, she would most likely be entitled to a larger sum than if Dudley were to seek compensation for his pinkie injury. This would be true even if Dudley could somehow demonstrate that he valued his pinkie far more than Silvia valued her leg. In a related vein, if the injury to the leg were the result of an intentional crime, and the injury to the pinkie as well, we would view the former as far more serious than the latter, regardless of how the respective victims feel about the seriousness of the injury, and we would judge the leg injury to call for more serious punishment than the pinkie injury. In other words, Silvia's effort to alienate her leg-related claims to Dudley will not succeed in allowing him to claim for his pinkie, should it ever be injured, what Silvia would have been able to claim for her leg.

So far we have dodged the most crucial question: what impact does Silvia's consent have on the liability of the doctor and of Dudley? We have seen that Silvia's consent will not change Dudley's self-defense rights, his due-care rights, his necessity and duress rights, and his compensation-related rights. But will it not at least change the situation this much, that the doctor and the pianist will escape all liability if the treatment they divert from Silvia is diverted with her consent? *The problem with giving Silvia's consent such effect is that Silvia really has no stake in what the doctor and Dudley do amongst themselves.* Whether or not Silvia gives her consent, she will not succeed in having her leg treated. If she refuses her consent, the doctor will end up treating Dudley's two-leg injury. If she grants her consent, he will end up treating Dudley's pinkie. Silvia herself will remain unaffected. To be sure, if the law were to say that her consent is required for the doctor to be able to treat Dudley's pinkie, she might be able to extract

18. See *id.* §§ 2.09, 3.02.

19. See GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 45 (1985).

some money from Dudley in exchange for that consent. But that does not make her different from anyone else on the planet to whom the law might grant veto power over the doctor's treatment of the pinkie. The question is whether Silvia should be judged to have some kind of claim to such a veto power, and given her lack of a stake in the matter, it seems she should not.

To drive this point home—or perhaps to belabor it unnecessarily—it will be useful once again to think about self-help rights, due-care rights, necessity and duress rights, and compensation-related rights, but this time from a slightly different angle.

One way to more fully appreciate just how little Silvia has at stake is to ask how aggressive a self-help remedy she would be entitled to use to vindicate her stake. It would seem that she would not be able to act very aggressively at all. Just suppose that the doctor were to proceed to treat Dudley's pinkie without first having secured Silvia's consent. Would Silvia be able to use even the slightest degree of force to prevent him from doing so? Given that one way or another, her own leg will go untreated, it seems she would not.

This is but one way of seeing the point. Another way of dramatizing the smallness of Silvia's stake is to inquire into the due-care rights by which it is protected. Suppose a third party were to engage in some activity that had the potential of preventing the doctor from treating Dudley's legs and that would lead to his treating Dudley's pinkie instead. Must that third party make costly efforts to ensure that such a contingency will not occur? And if it does occur, will he be found to have injured Silvia and to owe her compensation? Conversely, should Silvia be able to impose a significant risk on others in the course of trying to make sure that the doctor does not treat Dudley's pinkie rather than his legs? Given that nothing would please Dudley more than if the doctor were to be prevented from treating his legs and thus had to treat his pinkie instead and given also that Silvia will not suffer any adverse consequences if Dudley's pinkie rather than his legs are treated, one would be reluctant to impose on a third party the obligation to incur very significant costs to ensure that the pinkie gets treated rather than the legs.

A third way of driving home the smallness of Silvia's stake is to ask about the necessity and duress rights by which it is protected. Suppose that only by committing some serious crime could Silvia ensure that Dudley's legs, as opposed to his pinkie, are treated. Would she be able to do so? That is, would she be able to invoke the necessity or duress defense if she did so? Given that Dudley would prefer to have his pinkie treated and Silvia has nothing really riding on the matter, one would be reluctant to say she can commit such crimes.

A fourth way in which the smallness of Silvia's stake manifests itself has to do with her compensation-related rights. Suppose Dudley and the doctor decided to ignore Silvia and simply proceeded to a treatment of the pinkie. Would she be able to claim compensation for this wrong? For that matter, would she be able to claim that she had suffered a punishable harm by being deprived of the money they would have had to pay her to secure her

consent? Given that she would not have received treatment under any circumstances, one would be reluctant to recognize such a claim. Put differently, it is hard to see that Silvia has suffered a compensable or punishable injury when the doctor treats Dudley's pinkie ahead of his legs.

In sum, Silvia's consent would not do Dudley any good. It does not enable the doctor to go forward and treat Dudley's pinkie. The triage cycle thus furnishes us with a situation in which all parties even remotely concerned (Dudley, Silvia, and the doctor) want a certain transaction to go forward (namely the treatment of Dudley's pinkie in lieu of his legs) and have it in their physical power to make it go forward, but nonetheless are not permitted to despite the absence of force, fraud, or any of the other familiar consent-impairing conditions.

E. *The Essence of the Argument: More on Claims versus Desires*

Before turning to the implications my argument has for less artificial situations than my triage example, it will be useful to pause briefly and ask just what brought us to the bizarre-sounding conclusion at which we have arrived.

I have already alluded to what I take to be the root cause of that conclusion, the distinction between claims and desires. I am hardly the first to draw attention to this distinction; nor am I the first to note that it is one that is likely to be of profound significance and to generate many strange implications. Two philosophers, Thomas Scanlon and Thomas Nagel, are probably to be credited most with doing so. Strangely enough, however, neither they nor those following in their footsteps seem to have noticed that among those strange implications is a dramatic alteration of our familiar, Quasi-Libertarian picture of consent.

In a famous passage of his book *The View From Nowhere*, Thomas Nagel illuminates the distinction between claims and desires in a particularly striking way, one that, at least in retrospect, carries us right to the threshold of those implications but then stops just short of drawing them. Nagel explains that if a person has a bad headache, "everyone has a reason to want it to stop," and anyone who can easily get rid of the person's headache should do so.²⁰ Nagel continues:

The same may be said of other basic elements of human good or ill.

But many values are not like this. Though some human interests (and not only pleasure and pain) give rise to impersonal values, . . . not all of them do. . . . [I]f I badly want to climb to the top of Mount Kilimanjaro, not everyone has a reason to want me to succeed. I have a reason to try to get to the top, and it may be much stronger than my reason for wanting a headache to go away, but other people have very little reason, if any, to care whether I climb the mountain or not. . . .

20. THOMAS NAGEL, *THE VIEW FROM NOWHERE*, 166–67 (1986).

. . . [even if,] [a]s it happens, [I] may [be quite willing] to put up with severe altitude headaches and nausea to get to the top of a mountain that high.²¹

You can see within Nagel's example the seeds of something like the Original Triage Cycle. The Original Triage Cycle in turn contains within it the seeds of destruction for our conventional Quasi-Libertarian view of consent. What remains to be seen is whether any of that matters in situations less contrived than those contemplated so far.

III. THE ARGUMENT GENERALIZED

Let us, then, take the foregoing analysis and see whether it can be used to make sense of some cases in which we intuitively feel there is a problem with consent despite the fact that none of the conventional consent-impairing circumstances is present. As I noted in the introduction, I will consider four areas in which such cases are particularly common: tradeable pollution licenses; the assumption-of-risk defense; victimless crimes; and personal service contracts. I start with tradeable pollution licenses, not because they are the most important of the phenomena I consider, but because they are the easiest to explain and because they form a natural bridge toward the other topics.

A. Tradeable Pollution Licenses

For some time now, many economists have touted a system of tradeable pollution licenses as being a particularly desirable form of environmental regulation, better than the more traditional "command-and-control"

21. *Id.* at 167. Here, Nagel is echoing an equally famous passage from an article by Thomas Scanlon, in which he writes: "The fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat . . ." T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 659–60 (1975).

Some readers will be tempted to conclude from Nagel's and Scanlon's examples that when they speak about claims they are really just making a paternalistic judgment about what someone ought to desire (if he were only enlightened enough), namely the stuff he really needs. But that is just an unfortunate feature of the particular way in which Nagel and Scanlon choose to illustrate their point. In fact, there is nothing paternalistic about the judgment that someone who desires something intensely has a low claim to it or that someone who desires something only slightly has a strong claim to it. This becomes very clear when we consider claims that are based on something other than need.

Consider property claims. Person A may have a strong claim to something, let us say because he made it himself. Person B, who did not make it, may therefore have very little claim to it, while at the same time he may have a much stronger desire for it than Person A. When we say in this case that A has a stronger claim to the thing than B, we are evidently not saying anything paternalistic.

Another example. When Defendant causes harm to Victim A, let us say by not helping him escape some harm, like drowning, or by inflicting on him a purely accidental injury, he is infringing only on a very modest set of A's claims. By contrast, when Defendant causes harm to B by injuring him intentionally, he is infringing on B's very strong claim. The harm caused to A may be much greater than the harm caused to B. But A's claim to be free of such harm is nonetheless much weaker than B's claim to be free of such harm. Once again it is evident that this judgment about the comparative strength of claims has nothing to do with paternalism.

approaches, whereby the government simply mandates specific emission devices and emission limits for every polluter. The licensing system works roughly like this: The government decides on a certain tolerable maximum for emissions of a given type. It then allocates to each manufacturer a license to produce a certain amount of such emissions. Finally, it permits those licenses to be traded. This is regarded as an especially efficient form of environmental control because it gives each manufacturer an incentive to develop the most cost-effective, emission-reducing technologies and because it ensures that those who have the greatest need for such licenses are able to get them by buying them from others who have less need for them.

Nevertheless, this kind of market-based environmental regulation has its foes. But the foes have not been able to explain (indeed, seem to not quite understand) what it is that bothers them about this kind of approach. As one prominent foe, Robert Goodin, readily acknowledges:

[f]rom an economic point of view, the case for [market-based regulation] seems well nigh indisputable. Environmental economists are therefore frankly dumbfounded when such “unassailable” proposals nonetheless come under attack from fellow environmentalists. The latter, in turn, have proven particularly inept at articulating exactly what they see wrong with [them]. The exchange amounts to a veritable dialogue of the deaf.²²

Our analysis of the Original Triage Cycle will enable us to see the real problem with such tradeable pollution licenses.

Suppose we were to use the same approach to control traffic accidents. In other words, we first decide on a maximum number of traffic accidents we can stomach in light of the value we place on driving. Next we calculate what level of risk-imposition would produce that number of accidents. We then distribute to each driver a license to produce a certain amount of risk in a given year, such that the total amount of “authorized” risk will generate the maximum number of accidents we can live with. Obviously there are numerous conceptual and technological impediments that would not make this practicable. But that does not matter for our purposes here. Let us suppose it could be done. Should it be?²³

This is where a slightly modified version of the Original Triage Cycle can help in our analysis. Let us transpose the Original Triage Cycle from the context of triage into the context of negligent risk creation. Once again, assume Dudley has had an accident. Again assume that all he notices at first is the possibility of an injury to his pinkie. He turns to a friend and asks to be driven to the next emergency room as quickly as possible. The streets are congested, and a fast ride through the crowds is going to pose significant risks to bystanders. Is the friend entitled to thus endanger these bystanders? If he causes an accident, will he be liable? I am assuming that his speed is

22. Goodin, *supra* note 4, at 573–75 (citations omitted).

23. To perfect the analogy, a lot more needs to be added into the example. One needs to ensure, for instance, that not only the average risk but also the statistical distribution of risk remains unchanged as a result of the licensing scheme. I don't believe, however, that my analysis would be affected by those details.

one that would, under ordinary circumstances, be judged excessive, unwarranted, and liability-producing. But these are not ordinary circumstances, since he is trying to get treatment for Dudley's pinkie. Is that reason enough? Probably not. The threatened injury to the pinkie would probably not be judged to be a serious enough matter to warrant imposing any great risk on the bystanders. But what of the fact that the pinkie is so important to Dudley? And what if we were to add that the bystanders are all depressed poets, like Silvia, whose imperturbably miserable state would not be greatly affected by an injury? The answer presumably would not change, just as it would not in the Original Triage Cycle.

Now let us add the familiar further wrinkle: Suppose that just after being rebuffed in his request to his friend to drive faster, Dudley notices the injury to his two legs. Will he now be allowed to ask his friend to drive faster? Presumably yes. The injury now being more serious, he is of course entitled to impose greater risk on the bystanders. But what if he says that, although he is entitled to have his friend drive faster on account of his legs, he would really like to get his pinkie treated first. Indeed, if a choice had to be made, he would sacrifice treatment of his legs for treatment of his pinkie. We would presumably be just as disinclined to let him insist that his friend impose great risks on bystanders for the sake of his pinkie as we were disinclined to let the ER doctor deprive Silvia's leg of treatment for the sake of Dudley's pinkie.

Much like Silvia, the bystanders would be able to say to the driver: "How can you give his pinkie priority over our general safety? Do we not have a greater claim to general safety than he has to his pinkie?"

To be sure, the driver might reply, as did the doctor, "Ordinarily yes, but in this case he also had an injury to his legs, which has a greater claim to being treated than your claim to maintain your physical safety. He decided to trade in, as it were, that claim to have his legs treated, for the treatment of his pinkie."

"We don't see why that matters any," the bystanders would again be able to reply. "Suppose he had told you that he enjoys fast car rides, and that what he would most like you to do is to drive as fast as you would for his leg injury, even though he will not in fact have his legs treated, just for the thrill of it. Would you acquiesce in that? We just don't see how you can give something as trivial as his concern for his pinkie priority over our more serious concerns." The argument seems no less compelling here than in the original triage case.

We have thus recreated the same cycle as before. The driver is supposed to give preference to the pianist's legs, because a 100% certain leg injury counts for more than the mere possibility of a serious injury to the bystanders. (The Basic Priority Argument.) He is supposed to give preference to the pianist's pinkie over his legs because the pianist values his pinkie more than his legs, or differently put, because that is the Pareto-optimal thing to do. (The Pareto Argument.) And finally, he is supposed to give preference to the bystanders' safety over the pianist's pinkie, because one person's claim to a restored pinkie counts for less than many people's claim to safety from

serious injury. (The Regained Priority Argument.) Once again, we have a cycle, and the most appealing way of breaking it would seem to be, just as before, to cast the subjective preferences of the pianist aside.

Notice that the case for disregarding Dudley's wishes looks, if anything, stronger in our "negligence cycle" than in the Original Triage Cycle. Dudley's arguments that he *could* have sped to the ER for the sake of his legs and that he therefore should be allowed to speed there for the sake of his pinkie sound even more hollow in this context than in the Original Triage Cycle.²⁴

We can now see why tradeable licenses make us so uneasy. Once we allow a license to drive negligently to be traded, then transactions of the type we just found to be unacceptable in our transposed triage cycle would become routine. Every driver would be allocated a license to impose a fixed amount of risk on people around him and could do so for whatever purpose he liked, including the saving of a pianist's pinkie. And if he does not have enough of a license to impose all of the risk he wants to impose, he can buy what he needs from others. As a conceptual matter, there is no real difference between a license to drive negligently and a license to pollute. And therein lies the problem with tradeable pollution licenses.²⁵

B. *The Assumption of Risk and Victimless Crimes*

One issue that arises repeatedly in criminal and tort law is whether the victim's consent to risk ought to exonerate the defendant. It arises most clearly in tort law with regard to the scope of the assumption-of-risk defense. It arises in criminal law in connection with risky activities, like drag racing, if one of the participants dies.²⁶ It also arises at the level of criminal law policy in so-called victimless crimes when we decide to make something a crime despite the fact that its alleged victim would very much like to engage in it: prostitution, drug-consumption, drug-selling, gambling, and the sale of body parts for transplant purposes. Let us see how our analysis can shed light on this.²⁷

24. By contrast, many of the arguments against indulging Dudley's wishes ring even truer. For instance, the argument about costs and benefits: "What is the cost," we might ask, "of not letting Dudley speed? It is either that he loses some dexterity in his pinkie or that he loses his legs. It can't be both, because we are supposing that only one of these can be treated in time. If it is the lost dexterity of his pinkie that constitutes the cost of not speeding, then surely his claim to a healthy pinkie is weaker than the bystanders' claim to their own bodily safety. If it is the loss of the legs that constitutes the cost, then he must have his legs treated when he arrives at the ER rather than his pinkie. Either way he cannot have his pinkie treated."

25. I do not really mean to urge that we abandon tradeable pollution licenses. Rather, I mean to lay bare the compelling intuitions that lie behind the strong reservations they elicit among many people, despite the fact that the transfer of such rights does not involve force, fraud, or other recognized consent-impairing elements, and despite the fact that it is so much more efficient than the alternative.

26. See SANFORD H. KADISH & STEVEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 545–50 (7th ed. 2001).

27. The problem I am here considering involves what is usually put under the heading of the "express" and the "primary" assumption of risk, rather than the so-called secondary assumption of

Let us return to the most recent modification of the Original Triage Cycle, what I have called the “negligence cycle,” and add a new element to the mix. Let us imagine that the driver who would like to take Dudley to the ER to have his pinkie fixed first asks the endangered bystanders whether they would agree to let him do so, say, by offering them some money in return. Let us suppose that they consent to assume that risk. Absent their consent, we know the driver would not be permitted to race his car to the ER. Has the bystanders’ explicit assumption of risk changed anything?

We could now completely retrace our earlier analysis of why recognizing Silvia’s consent in the Original Triage Cycle is problematic, or rather, ineffective. The argument would in every respect go as before. But even if we did, we would not yet have dealt with the typical case of consent to a risky activity. That is because the Original Triage Cycle—and its negligence counterpart—has a peculiar triangular structure, whereas the typical assumption of risk situation has a much simpler, dyadic structure. In the Original Triage Cycle, Silvia’s consent could not affect whether she would receive treatment. Whatever she did, Dudley would be the one receiving treatment, either for his legs or for his pinkie. Similarly, in the negligence version of this cycle, the bystanders’ consent could not affect whether they would be exposed to the driver’s breakneck speeding to the ER. Whatever they do, the driver will either take Dudley to the ER to get his legs fixed or to get his pinkie fixed. The typical assumption of risk case of course is not like that, but we can modify our examples slightly and will then produce a situation quite like the usual assumption of risk situation.

Really, all we need to do is delete from our negligence cycle one of the alternatives, namely Dudley’s two-leg injury. In other words, let us suppose that Dudley has not suffered any injury to his legs. The only injury he suffered is that to his pinkie. He continues to be as eager as before to speed to the nearest ER, come what may. Let us now suppose that Dudley offers the bystanders some money for their consent to putting up with the dangerous ER vehicle speeding by, and let us suppose they accept it. *Should* that consent be effective? What happens to the arguments made in the earlier context? Do they still apply? If so, what do they look like? The answer is that they will need to be adapted a little, but they pretty much work as before.

As before, there are a variety of easily overlooked indirect ways in which the bystanders’ consent is clearly *not* effective. First, the bystanders will not be able to alienate their *self-help* rights: in other words, whatever major force they might be able to use against third parties, in defense of those body parts they have put at risk by letting Dudley speed past them, Dudley will not be able to use the same amount of force to protect his

risk. The main puzzle raised by the secondary assumption of risk is this: the plaintiff engages in an activity despite the fact that he knows full well that it is very risky. He never actually consents and the question then arises whether his actions are to be deemed as tantamount to consent. In the cases I am considering, no one disputes that the defendant consented, and meant to consent, but we nonetheless have doubts about the validity of his consent. For further background, see Simons, *Full Preference*, *supra* note 2.

pinkie. Second, the bystanders will not be able to alienate their *due-care rights*: whatever precautions third parties are required to take with regard to the bystanders' safety will be greater than the amount they will be required to take with regard to the safety of Dudley's pinkie. (Conversely, Dudley will not be able to impose on others the same risks on behalf of his pinkie as the bystanders could impose on others on behalf of their own bodily safety.) Third, the bystanders will not be able to alienate their *necessity and duress rights*: whatever serious crimes they might be entitled to commit to avert a threat to their bodily safety, Dudley will not be able to do something equally serious to protect his pinkie. Finally, the bystanders will not be able to transfer their *compensation rights* to Dudley: whatever amount they might be entitled to if someone inflicts a major injury on them, Dudley will not be able to demand an equal amount of compensation if someone should in the future injure his pinkie.

What now of the key issue: should not the bystanders' consent at least prevent the driver and Dudley from being liable for a crime or a tort if an accident occurs? The problem is that if we were to give the bystanders' consent such effect, we would, as in the original triage case, run into a problem having to do with the nature of the stake they have in Dudley's decision. The problem, however, is subtler than in the original triage case. Let us suppose that the driver starts driving Dudley to the ER at breakneck speed without first obtaining the bystanders' consent and see what difficulties this will now give rise to.

(1) *The self-help problem.* By driving at such a dangerous speed without the bystanders' consent, the driver is in effect launching an assault on their bodily safety. This entitles the bystanders to respond with some measure by way of self-defense. But suppose they would have been willing to give their consent to the driver's actions for a certain amount of money, had he but offered it, and suppose we would view that consent as valid. *The driver's wrong would then have to be interpreted as simply depriving them of that sought-after sum of money.* Put this way, it seems awkward, of course, to say that they are entitled to use force to stop him. They would not, after all, be permitted to use force to protect a monetary entitlement! In other words, once we allow consent, we run into a difficulty with defining the bystanders' stake in their safety. Do we say it is substantial enough to warrant the use of force, because it is their bodies that are under attack? Or do we say that, in truth, only money is at stake, so they cannot so respond?

(2) *The due-care problem.* Suppose the bystanders faced some threat to their bodily integrity and could only avoid it through some action that would impose great risks on others. Given that what they have at stake is their life and limb, we will tend to allow them to impose quite substantial risks to that end. But suppose they are about to give up the safety of their life and limb for some relatively modest sum of money. Now it seems strange to allow them to impose such risks on others. They are in effect doing it only for the sake of the money. (Conversely, should the bystanders be able to insist that others take costly precautions to avoid harming their life and limb, when

they are in fact about to exchange them for quite possibly a much lower sum in their deal with Dudley?)

(3) *The necessity and duress problems.* Suppose the bystanders could only avert some major calamity to themselves by committing some serious crime. Depending on the seriousness of the calamity and the relative seriousness of the crime, the necessity and duress defense would permit them to so act. But now suppose that they are in fact about to subject themselves to the high probability of such a calamity for some sum of money that Dudley is offering them. Now they would in effect be committing those crimes for the sake of a certain sum of money, just the sort of thing that the necessity and duress defense generally do *not* protect.

(4) *The measure-of-harm problem.* If Doc and Dudley speed to the ER without asking the bystanders' consent and injure them, what should be the measure of compensation? Should we be constrained to limit it to the amount they would have settled for, had Dudley tried to buy their rights? Or suppose the opposite to be the case: suppose they would never have settled for a sum of money as small as what they would ordinarily obtain by way of compensation for a tort injury. Will their idiosyncratic preferences entitle them to this larger sum? Note what it will lead to if we give their preferences that much weight: someone might start walking around with a sign tied to him that warns potential tortfeasors, "If you jostle me, I ask \$1 million per jostle."²⁸

At this point I expect the reader to balk. It would seem as though I have proven much too much. I seem to be saying that it is impossible for people to successfully consent to risk under any and all circumstances. But that is in fact not the conclusion to be drawn from what I have said. The difficulties I have described do not arise in connection with all assumptions of risk. They are peculiar to cases in which the victim assumes the risk of personal injury. When property damage is involved, the analysis no longer applies. So for instance, when property changes hands, there is no problem in transferring along with it all the self-help rights the transferor enjoyed to the transferee. The same goes for the transferor's due-care rights, and his necessity and duress rights. (Things are less clear with regard to his measure-of-harm rights.) With regard to property, the transferee is thus able to relatively smoothly step into the shoes of the transferor and give the transferor's consent the fullest possible effect.

Our analysis thus fits rather nicely with our intuitions and practices concerning the assumption of risk. The usual discomfort felt with the

28. I have not carried the parallel to the triage cycle as far as it could go. One could, for instance, strengthen the argument further by imagining (as I did there) a situation in which something or someone threatens to rearrange things in such a way that the bystanders, without first giving their explicit consent, receive the payoff they would be willing to accept in return for allowing the speeding, and Dudley would be carried at the desired speed to the hospital. One could then ask the question, how much of an interest do the bystanders have in the non-occurrence of such an event? If we measure the depth of their interest in the same way as before, by asking about their "due-care interest," their "necessity interest," etc., the answer will be that they have only the slightest interest at stake. That in turn suggests that the presence or absence of their consent should not be regarded as something of great significance.

assumption of risk ordinarily only relates to personal injury, not property damage. Our analysis also makes it clear that there is nothing, strictly speaking, illogical about having an assumption-of-risk defense, only that it is in severe tension with other doctrines we prize even more than the right of free choice.

*C. Implications for Specific Performance, Self-Enslavement,
Organ Lotteries, and Draconian Penalties*

I promised at the outset that my analysis would shed light on the vexing long-standing issue of why the law does not grant specific performance for personal service contracts. One hornbook answer is that personal service contracts are very hard to specifically enforce: we can force the opera singer to sing, but we cannot force her to sing *well*. Another hornbook answer is that forcing someone to render a personal service is akin to slavery. Neither of these two answers seems very satisfactory. Each really only explains why parties might not want to enter into a specifically enforceable personal service contract in the first place. The impresario has to worry that no court could ever force the singer he hired to sing well; the singer will worry about having made herself a temporary slave. Suppose, however, that the parties are willing to set aside these worries. They really *would* like to commit to a specifically enforceable personal service contract. Why does the law not let them?²⁹

The beginnings of an answer, strangely enough, can be found in the law of rape. For intercourse to count as consensual, the kind of consent that makes a commercial bargain consensual will not suffice. Commercial bargains simply require advance consent. Consensual intercourse requires *contemporaneous* consent. But while the requirement of contemporaneous—as opposed to advance—consent is most conspicuous in the context of intercourse, it is by no means peculiar to it. It would seem that advance consent to any kind of bodily invasion has to be contemporaneous: sports, massage, surgery, not to mention voluntary euthanasia (in jurisdictions that permit it) all require not just consent, but contemporaneous consent. The ban on specific performance of personal service contracts thus seems like just another manifestation of the same phenomenon.

In a way, this simply broadens the mystery. Why does consent to bodily invasions have to be contemporaneous when it does not have to be with regard to other kinds of transactions? Why treat voluntary *ex ante* commitments concerning our bodies so very differently from similar commitments with regard to other assets?

Let us see how our analysis of the triage cycle serves to demystify what is going on here. For this purpose, it will be helpful to construct yet another version of that cycle. Previous cycles were constructed by combining the Original Triage Cycle with the doctrines of negligence and necessity. Our next cycle will be constructed by combining it with the act-omission doc-

29. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 16.5 (5th ed. 2003).

trine. By act-omission doctrine, I am simply referring to the rule that, absent certain special duty-creating relationships, a defendant is not liable for merely letting someone be harmed, as opposed to committing a harmful act against him.

It is not immediately obvious how one might recreate a version of the triage cycle in the context of the act-omission doctrine. Negligence and necessity have a certain basic structure in common, which they share with the Original Triage Cycle: they involve the weighing of harms (albeit in slightly different ways). That makes it easy to construct a version of the Original Triage Cycle around them. Now, although the act-omission doctrine does not involve a weighing of harms, it does involve something sufficiently similar—a weighing of means—for us to be able to construct something similar to our triage cycle. Let us see what such a cycle would look like.

The act-omission doctrine, like all legal rules, tells us how to choose among certain alternatives.³⁰ But unlike the doctrines we have looked at so far, it tells us to choose on the basis of the means these alternatives entail, rather than the ends. To be more precise, given the choice between helping someone escape death and letting him die, the act-omission doctrine tells me that I am entitled to produce his death, so long as I do so by the innocent means of an omission, rather than the culpable means of an act. Making this choice involves a kind of weighing. Courses of conduct that cause their harmful effects by way of an omission are to be counted *no worse* than courses of conduct that cause no harmful effects whatsoever and are to be counted *superior* to courses of conduct that cause less harmful consequences by way of an act. In carrying out this weighing, the “means” aspect of the course of conduct—whether it is an act or an omission—is the only thing that matters.

Now that we have reconceived of the act-omission doctrine as a kind of weighing, a cycle can be constructed pretty much along the same lines as before. The kind of example that fits the bill is one that will already be familiar from other contexts. Victim is drowning. Defendant, a medical experimenter, sees what is going on from afar. It so happens that he is looking for someone to be the guinea pig for a risky vaccination he has developed. He decides to rescue the drowning man and, immediately upon dragging him ashore, injects him with the vaccine. The medication leaves the man paralyzed from the waist down. Is the defendant liable for what he has done?³¹

The cycle that inheres in this example goes like this. Defendant faces three possible options:

- (1) Defendant could rescue Victim outright, and leave it at that.
- (2) Defendant could let Victim drown.
- (3) Defendant could rescue Victim and then try out the vaccine on him.

30. See MODEL PENAL CODE § 2.01 (1962).

31. One prominent place where examples of this kind are considered in some depth is SHELLY KAGAN, *THE LIMITS OF MORALITY* 94–101 (1989).

As between (1) and (2), rescuing the Victim outright or letting him drown, Defendant is entitled to opt for the latter because of the act-omission doctrine. As between (2) and (3), letting the Victim drown or saving and vaccinating him, it seems he should be entitled to opt for (3) since that improves both his and the Victim's lot. He does no harm, and the move is Pareto-optimal. Yet, as between (3) and (1), saving the Victim and vaccinating him, or simply saving him, it seems he is only entitled to opt for (1). Having saved someone's life in the past is not usually thought to entitle you to subsequently injure him.

Next let us add the element of consent into our act-omission cycle. Let us suppose that prior to rescuing Victim, Defendant asks him whether he would agree to letting himself be injected. Victim, realizing that he would still come out as a net beneficiary in this transaction, says yes. Having dragged Victim ashore, is Defendant now in fact able to do what he was not allowed to do before? For many people, the intuitive answer is no. But how can we explain this glaring interference with free choice?³²

All we need do to find an answer is to transpose our analysis of the Original Triage Cycle and our reasons for disallowing consent to make a difference there into the act-omission setting. Let us ask ourselves what it would mean if the consent of Victim vis-à-vis Defendant in the act-omission scenario were completely effective. It would mean that all the rights Victim had vis-à-vis his body prior to the rescue would now protect the promissory interest Defendant has acquired as a result of his deal with Victim. What are those rights? They include some, by now, familiar rights as well as some others. Here is a non-exclusive list:

(1) *Self-help rights*.³³ When the drowning victim in my rescue hypothetical refuses to abide by his original promise, he is of course violating the rescuer's promissory right to carry out his experiment. But that promissory right appears not to be on a par with other, more serious rights, like the right to bodily integrity or even just plain vanilla property rights. It seems that the owner of a promissory right will not be allowed to protect his interest by the same forcible means he might use against a thief who appropriated something in his actual possession. Thus the rescuer will not be able to use physical force to compel the drowning victim to submit to the vaccination. There is nothing terribly mysterious about this. This is how self-defense works: we are entitled to use force with regard to some things that we have a strong claim to, albeit a weak desire, and not with regard to other things that we have a weak claim to, albeit a strong desire. Property is something we

32. Some might think this is simply a case of coercion, the choice facing Victim being so dire. While I am doubtful, we could, at the price of making the example a little more complicated, eliminate this feature of the case. We could arrange things such that Victim could in fact achieve his own rescue but only at some significant cost to his health (or if that too still seems too coercive, at some material cost, perhaps the destruction of some property he has on himself or the loss of some heavy valuables attached to his body). To avoid paying this high price, he agrees to Defendant's proposed deal.

33. That is, the right to use relatively intrusive physical means to vindicate one's interests against an invader.

have a weaker claim to than bodily integrity, hence less force may be used to protect the former than the latter. And promissory rights give rise to even weaker claims than property rights and hence force may not be used to protect such rights.

(2) *Due-care rights*.³⁴ We do not generally think that third parties have the same obligation to avoid inadvertently interfering with a promissory right as to avoid interfering with the more substantial rights to property and bodily integrity. If person X engages in a risky activity that might interfere with the transfer of some property that Y has promised to Z, he will not be treated like someone who engages in a risky activity that might destroy property already owned by Z. Nor will Z be able to impose significant risks on third parties while he tries to ensure that Y performs his promise to him.

(3) *Necessity and duress rights*.³⁵ What this would mean here is that Defendant would be able to commit some wrong against a third party to protect his promissory right. We do not, in general, think that someone would be allowed to do that in the same way and to the same extent as when he is seeking to prevent a piece of property from being taken out of his possession.

(4) *Rights against governmental takings*. When the government expropriates someone's property, it is obligated to compensate him. If the government does something that deprives him of a promissory right he previously enjoyed, the obligation to compensate does not kick in. That indirectly testifies to the much less sturdy nature of a promissory right, and the comparable weakness of the claim it represents. In the context of my rescue example, if the government were to do something that suddenly deprived the rescuer of the possibility of carrying out his planned experiment on the drowning victim, that would not be considered a taking that calls for compensation.

(5) *Rights protected by the criminal law*. One's body and one's physical property are protected by criminal statutes. Their invasion amounts to homicide, mayhem, theft, etc. Not so with promissory rights. Their violation is merely a civil matter, apparently because the right seems too flimsy to warrant more. When the drowning victim breaches his promise to submit to the rescuer's vaccination, we do not equate that with an invasion of rescuer's property rights.

Given the flimsiness of that right and given how little the rescuer can do to vindicate it, the fact that a court cannot force the drowning victim to submit to the vaccination no longer seems very surprising. It seems entirely in keeping with the denial of those other rights. But this does not just explain the impermissibility of enforcing personal service contracts by injunction or by self-enslavement (which really amounts to the same thing);

34. That is, the right to insist on adequate precautions by those whose risky conduct endangers one's interests and the corresponding right to impose certain risks on others in the course of pursuing one's interests.

35. That is, the right to commit certain kinds of wrongdoing if they are necessary to protect one's interests.

it also casts new light on two other situations in which consent has been viewed as puzzlingly ineffective.

The first of these are organ lotteries. Suppose someone were to found a “kidney club,” which would operate as follows.³⁶ If any member of the club should suffer total kidney failure and need a kidney transplant, a lottery will be held, as a result of which some other healthy member will be required to donate one of his two kidneys to his ailing comrade. Doing so of course will require him to undergo onerous and not entirely risk-free surgery, but beyond that will not put him at any further risk. Giving up one of two kidneys does not in fact increase one’s chances of dying of kidney disease. Any disease that might befall one’s kidneys almost invariably befalls both, so that the second kidney virtually never functions as a “spare” for its failing counterpart. Joining a kidney club makes good rational sense. It assures that one will have a kidney in case one should have total kidney failure, and it does so at the price of the small possibility of having to donate one of one’s own kidneys. Now the interesting question: suppose a member refuses to undergo the kidney-sacrificing surgery after he has “lost” at one of these lotteries. Can he be forced to undergo it? The foregoing analysis corroborates and explains what intuition already counseled: no.

The requirement of contemporaneous consent can also explain something else. The question has sometimes arisen, what exactly would be unfair about draconian criminal penalties so long as these are announced well in advance?³⁷ Its victims know what might happen to them if they engage in certain activities that carry that risk. What could they possibly complain about? To be sure, sometimes the problem is that the draconian penalties are attached to conduct that people should be free to engage in, but often they are simply attached to conduct that we are perfectly comfortable criminalizing but do not think deserves such disproportionate punishment. Indeed often it is the case that someone might well have voted favorably—or would have voted favorably—in a referendum in which such penalties had to be approved and then suddenly found himself at the receiving end of them. We can now say why his prior vote—even if construed as consent—does not amount to much. Punishment typically involves invasions of the body (for example, confinement) and with regard to such invasions advance consent does not count. Monetary penalties of course would be a different story, which also fits with our intuitions.³⁸

36. See John Harris, *The Survival Lottery*, 50 PHIL. 81 (1975).

37. See Larry Alexander, *Consent, Punishment, and Proportionality*, 15 PHIL. & PUB. AFF. 178 (1986).

38. As an aside on a matter that surely deserves more extended treatment elsewhere, this should give one a new perspective on all kinds of social contract arguments. Social contract arguments usually refer to a person’s *ex ante* consent (sometimes actual, more often hypothetical) to a vast range of things, including many that would constitute invasions of the body. What I have said casts a large shadow over such arguments.

D. *Provisional Summary*

It is time to take stock. Where does all of this leave us?

We have uncovered some unfamiliar problems with certain kinds of consent. We have found that sometimes things are inalienable that we barely suspected harbored such a difficulty. The root source of the difficulty seems to be that it is very difficult at times to combine respect for consent with respect for other, even more deeply entrenched legal doctrines. If we try to respect them both we end up in a cycle. The examples I gave—triage, assumption of risk, specific performance, pollution permits—surely do not exhaust the situations in which respect for consent generates cycles. They are likely to be only the most clear-cut instances of it.

It is natural to wonder whether there is not a more economical way to characterize this new kind of consent-impairing exception than merely to say that consent fails where it generates cycles. If we want to check whether consent fails by reason of force or fraud or incompetence, we immediately know what we need to look for. But if we want to check whether it gives rise to cycles, it is much less evident how we should proceed. I am afraid that this is simply an unfortunate fact about this new kind of exception. It is surely the main reason why the exception has been largely overlooked so far. Nonetheless, I think I can furnish at least a tip-off for when a situation is likely to raise cycling difficulties. The tip-off is that one or more of the parties to a transaction are exchanging something to which they have a weak claim (as opposed to a strong desire!) for something else to which they have a comparatively much greater claim: a two-leg injury (strong claim) for a pinkie-injury (weak claim), as in my triage case; personal safety (strong claim) for money (weak claim), as in my assumption-of-risk case; personal autonomy (strong claim) for a promissory interest (weak claim), as in my specific performance case.³⁹ I do not know whether the presence of such vastly disparate claims is a necessary or sufficient condition for consent to produce cycling, but it is definitely a tip-off.

Whether respect for consent in a given case should be ignored on account of cycling is not an either/or matter. Consent might give rise to a lot of very significant cycles or it might give rise to only a few relatively insignificant cycles. Even the least controversial kind of contractual transaction harbors within it the possibility of at least a few small cycles, but we should not on that account expect it to fail.⁴⁰ But the more serious the cycling gets, the more likely it is that consent *will* fail. That this is a matter of degree should not unduly concern us. The same is surely true of the more familiar categories of exception: force, fraud, incompetence etc.

39. By “personal autonomy,” I am referring to the would-be-rescuer’s right to abstain from the rescue; by “promissory interest,” I am referring to his contractual right to inject the vaccine into the person he saved.

40. Every time someone makes a present payment for a future performance, he is giving up something to which he has a strong claim (property) for something to which he has a much weaker claim (the fulfilment of a promise of future performance). This phenomenon can be used to generate cycles. But they won’t be nearly as worrisome as the ones we have seen.

IV. FURTHER RAMIFICATIONS: THE ROLE OF WELFARE ECONOMICS IN THE LAW

A. Fairness versus Welfare: *The Argument of Kaplow and Shavell*

We come now to Kaplow and Shavell's recent temper-raising book on the conflict between welfare and fairness to which what I have to say has great relevance.

Combining a host of fresh insights with reinvigorated versions of older arguments, the book presents an extremely powerful challenge to those of us who think that legal analysis and the design of legal rules are not exclusively about finding rules that maximize welfare as defined by a suitable social welfare function. The book's argument consists of four parts: first, a demonstration of the incompatibility between any kind of fairness notion and the Pareto principle; second, a demonstration that this is not merely a theoretical possibility but an ubiquitous occurrence in the law, from torts, to contracts, to property, to criminal law and civil and criminal procedure; third, that the fairness theories that engender this conflict don't offer any account as to why this inevitable feature is at all desirable or even tolerable and of how they can continue to remain plausible in light of it; and fourth, a sketch of an evolutionary explanation of why fairness notions, despite their welfare-reducing properties, have gained such a hold over our intuitions. What I have to say has bearing mostly on the first of these four parts and somewhat on the second and third.

Let me first briefly sketch out, in very stripped-down but I think for our purposes quite adequate fashion, their two key arguments about the tension between the Pareto principle and fairness.

(1) *The Argument from the Reciprocal Case.* Kaplow and Shavell ask us to consider a world in which various torts are committed by various tortfeasors against various innocent victims. They ask us to picture this world in a particular way: we are to assume that over a lifetime everyone will end up being a victim as often as he will end up being a tortfeasor. In other words, he imposes as much risky and injurious conduct on others as he is subjected to by them. What would a welfare-oriented economist say about such a world? He would say that there should probably not be any compensation for tortious injuries in such a world because everyone will be paying out as much as he will be taking in, and since the process of litigating such cases and enforcing the resulting verdicts will cost money, everyone would be better off if all injuries are simply allowed to lie where they fall.⁴¹

What will the typical fairness theorist—for example, someone who thinks that negligently inflicted harm needs to be compensated—say about such a world? He will, of course, insist on compensation in every one of these cases because that is what he in general would insist on. Yet in this case it squarely puts him into conflict with the Pareto principle since everyone would be better off if no such compensation were paid.

41. KAPLOW & SHAVELL, *supra* note 7, at 100–13.

This is a deceptively simple argument with a really surprising punch, which is why no one else thought of using it before. To fully appreciate it, let me quote what Kaplow and Shavell specifically say about it:

[M]ost corrective justice theorists give little or no attention to the reciprocal case Yet it seems to us that any satisfactory normative theory must ultimately address this basic, paradigmatic situation. [So far it simply] does not appear to have been recognized that applying any notion of fairness in the reciprocal case entails making everyone worse off in every instance in which the principle leads to a result different from that under welfare economics. That any normative theory involving a notion of fairness has this implication in the simple, reciprocal case suggests that the theory suffers from a fundamental problem, not one of the sort that might be avoided merely by making minor adjustments. . . .

*It will not do, for example, to argue that the theory remains valid and compelling generally, subject to some special exception for the reciprocal case, when the central determinants of the applicability of the theory have nothing to do with whether the reciprocal context applies.*⁴²

(2) *The More General Argument.* Consider two social policies, the Just Policy and the Unjust Policy. The Unjust Policy would create a society enjoying greater welfare than the Just Policy; the Just Policy would create a society that would enjoy greater fairness than the Unjust Policy. Now although the Unjust Policy creates greater welfare than the Just Policy, that does not of course mean that it is Pareto-superior to the Just Policy, since not everyone is better off under the Unjust Policy than he would be under the Just Policy. Nevertheless, Kaplow and Shavell argue, we can be logically certain that a hypothetical Second Unjust Policy exists that is as unjust as the first, but Pareto-superior to the Just Policy. Merely imagine a policy that gives everyone a multiple of the income they would have under the Unjust Policy, while keeping everything else the same, most especially the low level of fairness. If we make the multiple large enough, everyone under this Second Unjust Policy would be better off than they would be under the Just Policy. In other words, according to whatever standards of welfare or fairness we employ, there is the logical possibility of a society that is Pareto-superior to one that is fairer.

B. Kaplow and Shavell's Precursor: Sen's Paradox

Kaplow and Shavell's claim about the incompatibility of the Pareto principle and fairness has, as they fully acknowledge, a famous precursor known as Sen's libertarian paradox. What the Sen paradox (not really a paradox, just a counterintuitive thesis) claimed was that the Pareto principle is incompatible with granting people anything one might call a "right." That of course is a special case of the fairness claim. Granting people some rights is presumably one (very special) form of fairness. Sen's argument proceeds

42. *Id.* at 106–07 & n.55 (emphasis added).

rather differently from Kaplow and Shavell's, and he draws different lessons from it than Kaplow and Shavell draw from theirs. Here is how it goes.

In the course of proving Arrow's theorem, one is forced to prove a powerful little intermediate result, which basically says that if in making a collective choice, someone is "decisive" between two particular alternatives,⁴³ and if the Pareto principle holds, then he is bound to be decisive as between any alternatives whatsoever. In other words, he is a "dictator." While teaching Arrow's theorem and staring at this intermediate result, it occurred to Sen that one could give it a rather powerful interpretation that would make this intermediate result interesting in its own right rather than merely as a stepping stone toward Arrow's theorem. In a society in which people have rights, they are bound to be "decisive" as between some alternatives, at a minimum with regard to such trivial matters as whether they sleep on their stomachs or on their backs and quite possibly with regard to more momentous matters such as whether to read a certain book or not. What Arrow's intermediate result shows is that as soon as one gives people these modest rights one has given up on the Pareto principle.⁴⁴

Sen then offered an illustration that has since become famous. He imagines a society of two, named Mr. Lewd and Mr. Prude. There is in this society exactly one copy of D.H. Lawrence's *Lady Chatterley's Lover* (much in the news when Sen first published his paradox). Mr. Prude would prefer that no one got to look at this, to him, repellent book. Mr. Lewd by contrast would much enjoy reading it. What he would enjoy even more, however, would be for Mr. Prude to read it, so as to loosen him up a bit. Indeed if Prude were to read it, that would make Lewd even happier than if he himself got to read it. The result of this situation, argues Sen, is a conflict between what he calls "minimal rights" and the Pareto principle. We cannot, he says, grant Mr. Lewd and Mr. Prude the minimal right to decide whether they are going to read the book, while also endorsing the Pareto principle. The argument, in brief, is this: If we grant each party the right whether to read or not, then Mr. Lewd will choose to read, and Mr. Prude will choose not to read. But both of them would be happier if Mr. Prude read and Mr. Lewd did not read (because Lewd wants to loosen up Prude, and Prude wants to reform Lewd), which is therefore the Pareto-superior outcome they have failed to reach by exercising their rights.⁴⁵

43. In other words, as long as he prefers alternative (1) to alternative (2), then that is how the social ranking will rank it. If he prefers the reverse, then that is how the social ranking will rank it.

44. It is a curious fact about Sen's discovery that when one states it in this abstract way, it seems convincing to most people, but when one illustrates it as Sen does, it convinces very few. The reasons for this should become apparent in my reanalysis of the Sen paradox later on.

45. See generally Sen, *supra* note 5. Here is Sen's own, fuller explanation:

[T]he social choice [is] between three alternatives involving Mr. A reading a copy of *Lady Chatterley's Lover*, Mr. B reading it, or no one reading it. We name these alternatives *a*, *b*, and *c*, respectively. Mr. A, the prude, prefers most that no one reads it, next that he reads it, and last that "impressionable" Mr. B be exposed to it, i.e., he prefers *c* to *a*, and *a* to *b*. Mr. B, the lascivious, prefers that either of them should read it rather than neither, but further prefers that Mr. A should read it rather than he himself, for he wants Mr. A to be exposed to Lawrence's prose. Hence he prefers *a* to *b*, and *b* to *c*. A liberal argument can be made for the case that

Sen concludes from this that we must give up on the Pareto principle. After all, he says, we cannot give up altogether on rights. Surely there are some things—like deciding whether to sleep on one’s front or back—that we must leave to people to decide for themselves. Kaplow and Shavell of course drew the opposite conclusion. Given the choice between fairness and the Pareto principle, they think the Pareto principle should be chosen.⁴⁶

C. *The Other Side of the Debate: Chang and His Precursors*

Over the years Sen’s claim has come in for vehement criticism and so has Kaplow and Shavell’s. Let us see what the principal critiques have said.

1. *The Standard Critique of Sen*

The standard critique, reiterated again and again, with ever mounting fury by Sen’s critics at his refusal to accept it, has most recently been stated yet again in Richard Epstein’s book *Skepticism and Freedom*.⁴⁷ What the standard critique argues is that Sen’s claim is based on a patent misunderstanding of rights. He seems to think, the critics say, that rights are inalienable, but that is an extremely eccentric and implausible view of rights. If we treat rights as alienable, then Lewd and Prude will strike a bargain whereby Lewd agrees to give up his right to read the book in return for Prude’s obligating himself to read it. Here is how Epstein puts the matter:

In his essay “The Impossibility of a Paretian Liberal,” Amartya Sen seeks to show . . . why it is impossible to reconcile a belief in the liberty of individual choice with the achievement of social efficiency, as measured by the familiar Paretian standard

. . .

. . . [T]he two parties [in his example] are at loggerheads over whether both or neither read [*Lady Chatterley’s Lover*]. Lewd prefers the former, and Prude the latter. But they do have a limited area of agreement in that both men prefer that Prude not Lewd read the book if only one does. In this austere universe, however, Lewd reasons that he cannot compel Prude

given the choice between Mr. A reading it and no one reading it, his own preference should be reflected by social preference. So that society should prefer that no one reads it, rather than having Mr. A read what he plainly regards as a dreadful book. Hence *c* is socially preferred to *a*. Similarly, a liberal argument exists in favor of reflecting Mr. B’s preference in the social choice between Mr. B reading it and no one reading it. Thus *b* is preferred to *c*. Hence society should prefer Mr. B reading it to no one reading it, and the latter to Mr. A reading it. However, Mr. B reading it is Pareto-worse than Mr. A reading it, . . . and if social preference honors that ranking, then *a* is preferred to *b*. Hence every alternative can be seen to be worse than some other. And there is thus no best alternative in this set

AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 80–81 (1970).

46. That does not mean they do not think people should be able to decide whether they sleep on their backs or not. Rather, they think that situations in which this is the Pareto-optimal outcome are extremely unlikely to arise. And if they do arise, it will be because the parties have agreed to do so as a result of a Pareto-optimal bargain.

47. RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* (2003).

(as a free agent) to read the book, so Lewd has no reason not to read it himself. Prude realizes that he cannot stop Lewd (also a free agent) from reading this book, so he sees no point in reading it himself. The principle of liberty is thus said to lead to an outcome that neither prefers: Lewd, not Prude, reads the volume. Sen claims that his example exposes the weakness of the [Pareto principle]

But why? The original example did not assume a libertarian universe, for neither of the participants is allowed to trade with the other. Relax the prohibition and allow trade, and the paradox begins to unravel. Now the simplest deal is that Lewd proposes to Prude that Prude read the book and Lewd not. If these are the only choices on the table, then both sides should assent since each is better off than before. The conclusion that one draws from this is not the impossibility of being a Paretian liberal, but the necessity of being a Paretian liberal with an unwavering commitment to free trade.⁴⁸

Epstein here is echoing others, like Russell Hardin, who called Sen “transparently wrong” for not recognizing that “among the most important of all rights in the liberal canon are the right of exchange and its correlative right of contract.”⁴⁹

2. Chang’s Critique of Kaplow and Shavell

One of the first and most trenchant critiques of Kaplow and Shavell’s thesis comes from Howard Chang.⁵⁰ What he ingeniously demonstrates is that, although they do not realize it, their argument is subject to a very clever modified version of the Standard Critique of Sen. The heart of his argument, roughly paraphrased, runs as follows:

Kaplow and Shavell claim that no fairness theory can possibly accommodate the Pareto principle. I will show you how to construct one that does. Take any fairness theory you find attractive and simply add the Pareto principle as a further requirement. In other words, suppose your fairness theory ranks three states of affairs thus: first A, then B, then C. Suppose further that the Pareto principle would rank C ahead of A. Then under my new Fairness-plus-Pareto theory, we would re-rank our choices so that C ranks ahead of A.

Now, proceeding in this way will on reflection turn out to be unexpectedly complicated. How are we to rank B relative to C? Since B is fairer than C and C is not Pareto-superior to B, it would seem that B should continue to be ranked ahead of C. That would suggest that the final ranking should be: first B, then C, then A. But wait a minute: We assumed A was fairer than B. So how can we let B be ranked more highly than A? Something has to give. We will either have to put C ahead of B despite the fact that B is fairer and

48. *Id.* at 165–66 (emphasis added) (citations omitted).

49. RUSSELL HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* 109 (1988).

50. Howard Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 *YALE L.J.* 173 (2000).

C is not Pareto-superior to B, or we will have to put B ahead of A despite the fact that A is fairer and B is not Pareto-superior to A. We cannot have both.

What this shows us is that we cannot simply add the Pareto principle on top of whatever fairness theory we have. We will need to adapt the fairness theory in a variety of ways to avoid generating inconsistencies. This can get pretty complicated where more than three alternatives are involved. I have however devised an algorithm that allows us to do this relatively straightforwardly

Chang then lays out his very deft algorithm, the details of which need not preoccupy us here. What is important for our purposes is that he has found a way of taking just about any fairness theory and “blending” it, as it were, with the Pareto principle into a hybrid theory that seems to contradict Kaplow and Shavell’s claim that all fairness theories are necessarily inconsistent with the Pareto principle.

But if Chang is right and Kaplow and Shavell are wrong, where exactly are the holes in their argument? Well, in fact there are no holes. Rather, what Chang has shown is that Kaplow and Shavell’s argument depends on a crucial assumption about fairness theories, which he does not believe they are entitled to make and they believe they are. To see what this assumption is, let us reconsider what I called Kaplow and Shavell’s “General Argument”. Here is how I summarized it:

Consider two social policies, the Just Policy and the Unjust Policy. The Unjust Policy would create a society enjoying greater welfare than the Just Policy; the Just Policy would create a society that would enjoy greater fairness than the Unjust Policy. Now although the Unjust Policy creates greater welfare than the Just Policy, that does not of course mean that it is Pareto-superior to the Just Policy, since not everyone is better off under the Unjust Policy than he would be under the Just Policy.

Nevertheless, Kaplow and Shavell argue we can be logically certain that a hypothetical Second Unjust Policy exists that is as unjust as the first, but Pareto-superior to the Just Policy. Merely imagine a policy that gives everyone a multiple of the income he would have under the Unjust Policy, while keeping everything else the same, most especially the low level of fairness. If we make the multiple large enough, everyone under this Second Unjust Policy would be better off than he would be under the Just Policy. In other words, according to whatever standards of welfare or fairness we employ, there is the logical possibility of a society that is Pareto-superior to one that is fairer.⁵¹

Chang would claim that at the moment at which the Unjust Society’s income has been raised enough so that literally everyone is better off than he would be in the Just Society, then the Unjust Society has in fact become more (or at least no less) just than the Just Society, at least by the lights of his fairness-plus-Pareto theories. Kaplow and Shavell find it extremely odd that as long as even a single person in the Unjust Society is less well off than in the Just Society, the Unjust Society counts as substantially less fair

51. *See supra* p. 659.

than the Just Society, but that at the magic moment at which even that last person has been made merely a dollar better off than he was in the original Unjust Society, the fairness level jumps to match or exceed that of the Just Society. How can one dollar make such a difference? No plausible fairness theory, they think, can harbor such discontinuities. Chang by contrast thinks it can.⁵²

*D. The Debate Reevaluated through the Lens of the Cycling Argument:
Why Pareto Loses to Fairness*

Let us now see what this debate looks like when we think about it in light of the cycling argument and the scenarios in the context of which we encountered it. I will begin by looking at Kaplow and Shavell's Argument and then turn to Sen's Paradox simply because that is the order in which the relevant points are easiest to make.

1. Kaplow and Shavell Yet Again

My cycling argument partially undercuts and partially supports what Kaplow and Shavell claim. It also partially undercuts and partially supports what Chang claims. Let us see how.

Kaplow and Shavell argue that there is a profound tension between fairness and the Pareto principle. All the examples considered in this essay exemplify this tension. In each we get into an inconsistency-producing cycle so long as we remain committed to both the Pareto principle and some fairness-embodiment legal principle, like the negligence doctrine, which says that we are allowed to impose cost-benefit justified risks, or the necessity doctrine, which says that we are allowed to impose cost-benefit justified evils, or the act-omission doctrine, which says that people are entitled to not be harmed by their fellow men but not necessarily to affirmative help from them, etc. All of these examples are entirely in line with Kaplow and Shavell's claim.

But there is an equally important respect in which my analysis undercuts Kaplow and Shavell. The lesson that Kaplow and Shavell want to draw from

52. Chang's answer is that the point at which at least one member of the Second Unjust Society is worse off than his counterpart in the Just Society and the point at which every last one is better off are fundamentally different: Only in the latter case can we not in any way be said to be sacrificing the welfare of a minority to the welfare of a majority. Only in the latter case are we not doing anything that smacks of one of those forbidden utilitarian tradeoffs whereby we cut up one person to use his organs to save several others. To this Kaplow and Shavell reply that Chang is in effect attaching infinite weight to fairness by not letting it be outweighed by a sufficiently substantial gain to what may be a near-total majority of the society. Chang in turn notes that this is how all lexicographic sets of principles operate and there is nothing illogical about such a lexicographic ordering of principles. Not illogical, perhaps, argue Kaplow and Shavell, but very, very strange. Not so strange, says Chang.

Chang's answer to Kaplow and Shavell's Reciprocity Argument, their reply to him, his rejoinder to them, and their surrebuttal, etc., essentially proceed by thinking of the two policies in the reciprocal case as corresponding to the Just Society and the Second Unjust Society and adapting the previous exchange accordingly.

the tension between fairness and Pareto is that we need to give up on fairness. They do so by making the very compelling-sounding point that the Pareto principle is intuitively well-nigh irresistible, and that the fairness principles which contradict it are based on much more amorphous, hard-to-state and hard-to-justify intuitions. As it turns out, however, if I am right, they have simply not focused on the right fairness principles. The fairness principles which contradict the Pareto principle in the context of my examples are at least as, and arguably more, compelling than the Pareto principle.

Take the negligence cycle. It seems hard to resist the idea that each of us is entitled to impose some uncompensated risks on others. It also seems hard to resist the idea that they can only do so if, by some measure, the reasons for doing so are sufficiently compelling and the risks not too large in light of those reasons. Finally, and this of course is the crux, it seems hard to resist the idea that in making this assessment about cost-benefit justified risks, we do not simply compare the utilities of the two parties concerned. If we did, we would have to say that someone's desire not to miss his lunch appointment might, if sufficiently intense, warrant his exposing someone else to a near-certainty of a maiming. Instead we are to compare the claim someone has to what he is seeking to accomplish (for example the lunch appointment) with the claim his potential victim has to safety under the circumstances. All of these seem at least as hard to resist as the Pareto principle. That means that giving up on the Pareto principle is a far from absurd proposition.⁵³

Just to belabor this point a little more, let's consider the act-omission doctrine. It seems hard to resist the idea that someone has more of a claim to not being harmed than to receiving affirmative help in some calamity. This is of course at bottom a very libertarian idea, although many non-libertarians, if not all, would at least partially embrace it. Few would say that our failure to render very onerous and expensive assistance to someone who will otherwise die is to be treated as just as bad as actively killing him by plunging a knife into him. (Surely not every TV watcher who fails to heed Sally Struthers's exhortation to donate to UNICEF and save the life of a child should be considered a murderer, especially not those who have already given but are not giving more.) Once again it is not utilities but claims that guide our judgment. And so here too the Pareto principle is opposed by at least equally compelling fairness claims. This is a point that is apt to drive committed libertarians absolutely apoplectic. It shows that the two things which libertarians are most committed to, the idea that we have a duty not to harm but no duty to aid and the idea of near-absolute freedom of contract can simply not coexist. But it is a point that should make even quasi-libertarians—in other words everyone else—uncomfortable.

53. To be sure, not everyone has the same aversion to weighing the intensity of the speeder's desire to make his lunch appointment in assessing the cost of not speeding. But I remind such readers that there are many other situations in which they would find it surely hard to accept that the strength of someone's claim is governed by the intensity of his desire. My prime example for this, offered earlier in the Article, has been property claims.

Now nothing that I have said directly undercuts the logical correctness of Howard Chang's claim that it is logically possible to have fairness theories that respect the Pareto principle. What it does undercut is its relevance to law. The moral precepts that underlie our most basic legal doctrines, or at least those of criminal and tort law, are not like the "blended" fairness theories Chang shows us how to construct by his algorithm. The moral precepts underlying our most basic legal doctrines really do preclude the Pareto principle.

What unites both Kaplow and Shavell and Chang is their commitment to the Pareto principle.⁵⁴ Kaplow and Shavell are driven by this commitment to excise fairness from our legal doctrines. Chang is driven to construct doctrines that no longer resemble our basic moral ideas. My cycling argument is meant to suggest that it may be the Pareto principle that ought to yield instead, or at least, that judges and lawmakers who have restricted freedom of contract under otherwise hard to account for circumstances are responding to some quite coherent and defensible intuitions. Once we entertain this possibility we will be able to account for a lot of hitherto unexplained inalienabilities in our laws.

2. *Sen Yet Again*

What does my analysis imply about Sen's paradox?

As I have already indicated, many, perhaps most, people have concluded that Sen's paradox really is no paradox at all; rather, it arises from his extremely eccentric, downright question-begging conception of a right as something which cannot be alienated. The near-universal rejection of Sen's claim is odd for several reasons. First, it is odd because the corresponding, even more sweeping claim by Kaplow and Shavell managed to find many more adherents and sympathizers. It is also odd because the person whom many would regard as the ultimate spokesman and theorist of the libertarian point of view, Robert Nozick, actually thought Sen had posed a devilishly difficult challenge. In the introduction to a book he wrote some decades after, *Anarchy, State and Utopia*, he remarked in passing, and unfortunately without further elaboration that, "Amartya Sen's work on the Paretian liberal paradox shows that a very natural interpretation of the scope of individual rights and liberties, and of how the choices of society should be rationally organized, cannot easily be fit together. These notions need a new structuring."⁵⁵ And finally there is the fact that Sen himself has been so singularly unmoved by the criticisms.

Yet those criticisms seem awfully persuasive. Let us remind ourselves what they are. Sen had envisioned the case of a two-person society, inhabited by Mr. Lewd and Mr. Prude, needing to decide which of them, if any,

54. Here, for the sake of simplicity, I am overstating Chang's position a little. He is in fact not personally especially committed to the Pareto principle but finds it fruitful to proceed in his essay as though he were.

55. ROBERT NOZICK, *THE NATURE OF RATIONALITY* xv (1993).

should get to read a prurient book. Each of them has a right to read or not to read. That will mean that Mr. Lewd will read and Mr. Prude will not read. And yet, the Pareto-optimal outcome is one in which Prude reads and Lewd does not, because Lewd would like to loosen Prude up and Prude would like to stifle Lewd's prurient impulses. The seemingly irresistible criticism by Sen's critics has been to say that if the rights are simply considered alienable as rights ordinarily are, Lewd will agree not to read in return for Prude's promise to read, and the Pareto-optimal outcome will have been achieved without depriving anyone of his rights.

Sen's principal reply to this at first seems, and has seemed to all of his critics, to be a very lame one. He points out that such an agreement would not be practically feasible. It would be very intrusive, and thus liberty-offending, to monitor whether the parties are actually complying with it. It would require checking that Prude is in fact absorbing the contents of the book rather than merely pretending to be casting his gaze in the book's direction and that Lewd has not in fact secretly managed to sneak a peak at the book after all. Critics are unmoved because we are discussing an issue of principle, and this practical concern seems like a distraction.

My analysis will enable us to see why Sen is right, where his critics went wrong, and how one can make sense of his infeasibility argument, or at least show that he was groping for, though not quite wrapping his arms around, a very valid point.

Let us take a very close look at the bargain that Sen's critics say would eliminate the apparent tension between rights and the Pareto principle. To begin with, let us take in fully what things are like before they enter into the bargain and then examine what things look like afterwards. What would happen if, prior to the bargain, either of the two tried to get his way over the objections of the other? In other words, what would happen if Prude tried to just tear Lewd's copy away from him or if Lewd tried to shove a graphically illustrated copy in front of Prude's nose? To begin with, of course, each would be entitled to call the police for help and to have the aggressor prosecuted for some kind of trespass, assault, battery, or the like. Moreover, each would be entitled to use some potent self-help remedies, indeed actual physical force to resist the interference. They would also be able to obtain a specific injunctive remedy to prevent the aggressor from continuing in his aggression. They also have certain due-care rights vis-à-vis each other. Each is required to be careful lest by culpable inadvertence he end up interfering with the other's right to read or not read. And there are necessity and duress rights as well: to avert such invasion, the victimized party might be able to commit some other lesser crime, and conceivably sometimes, even a greater one.

Now let us see how things have changed after the bargain has been struck. Again imagine that one of the two, Lewd or Prude, aggresses against the rights of the other. Aggressing against his rights of course will now mean something else than before. For Prude to violate Lewd's rights no longer means preventing him from reading the book, since Lewd already promised not to read it. Instead, for Prude to violate Lewd's rights means

not following through on his own promise to read the book that is so distasteful to him. Conversely, for Lewd to violate Prude's rights no longer means forcing him to read the book, since Prude is now obligated to do so on his own. Rather, for Lewd to violate Prude's rights means finding a way to sneak a peek at the book in violation of his own promise not to read it.

Suppose then one of them has thus violated the rights of the other. What can the other do about it? A great deal less than he previously could do to vindicate his rights. For one, he cannot summon the police to enforce his rights, and he cannot complain about a crime. Breaching a contract is not a criminal matter and will not be rectified by police intervention.⁵⁶ In addition, he is severely limited in the self-help remedies he can utilize. He certainly cannot use force to compel the other to follow through on his promise. Nor can he obtain specific injunctive relief. He no longer enjoys the same "necessity" or "duress" rights he enjoyed before: he is not allowed to commit various criminal wrongs in order to secure the performance of his promissory rights. Nor, finally, does he enjoy the same due-care rights as before. The other party and third parties are not required to take the same level of precaution to avoid interference with his contractual rights as they were required to take to avoid interference with his property rights.

We know all of this intuitively, but we also know from our previous analysis that it is an unavoidable byproduct of our commitment to certain basic legal and moral precepts (discussed in the section on personal service contracts). As a result the Pareto principle here breaks down: a whole host of entitlements are in fact inalienable, despite the fact that each of the parties would very much like them to be alienable. When Sen speaks of the "infeasibility" of such agreements, I believe he was groping for this point, but without, as I said, fully succeeding in wrapping his arms around it.

*E. Why Giving Up on Pareto Is Less Costly
Than It Seems, or, What Are Lawyers For?*

It seems like a very unpleasant prospect to have to live without the Pareto principle. Restricting one's freedom of contract under circumstances where everybody would be better off if we did not seems an extremely costly way of satisfying whatever our other ethical commitments may be. But as I will show in a moment it is not nearly as costly as it appears at first.

Consider an example. Let us return to the negligence cycle. Bystanders might be willing to consent for suitable compensation to have the ambulance speed by them, and of course, Dudley is eager for that to happen as well. An outright bargain whereby the bystanders assume the risk may now be judged to be beyond their reach. And yet a ready substitute is in sight: if the bystanders were paid to remove themselves from the danger zone, that contract would pose no problems and would still effectuate the desired end. Now of course this is a more roundabout and second best way of getting to the outcome both sides want. It definitely is not the Pareto-optimal outcome,

56. Bailey v. Alabama, 219 U.S. 219 (1911).

but it is not so far off either. Giving up on the Pareto principle here does not have overwhelming costs.

Let's next consider the act-omission cycle. Both the drowning victim and the potential rescuer would like it to be possible to strike a bargain whereby the drowning victim permits himself to be used as a guinea pig for the rescuer's medication. Now suppose the rescuer were to find some mechanism whereby he delivers the medication by the very process by which he rescues the drowning victim. Perhaps by attaching a needle to the rescue vest such that the only way to don it is to be stung by the needle. Once again this is a second best solution. It is definitely not Pareto optimal, but it does not run afoul of the precepts that enforcing a bargain would.

Indeed it can be argued that this is the sort of thing lawyers are in the business of doing when they find suitable ways of structuring transactions.⁵⁷ It does seem somewhat ridiculous that such mechanisms should be available and should be the only way of avoiding the severe costs of giving up on the Pareto principle. Kaplow and Shavell do actually vaguely recognize this and think it is a devastating point against fairness theories that they should result in such maneuvers. They write:

Suppose there is a great need to build a hospital, but that inevitably at least one worker will die in a construction accident. One presumes that most [deontological minded philosophers] would endorse building the hospital in such a situation. It would be said that the death of the worker is an incidental cost rather than an instance of a direct sacrifice. Suppose, however, that the leader of the polity had available a button and that just before the worker was about to die, time stood still for a moment; if the button was pushed, the worker would die and the project would proceed to completion, but if it was not pushed, the work done to date would disintegrate, and construction would have to begin anew. (And, if further attempts were made to build the hospital, the cycle would be repeated.) Now, pushing the button is a direct act that sacrifices the worker, which is impermissible [and the hospital project would have to be abandoned] *It would seem that the only alternative lesson to draw from such examples is that changes in the technology of such things as push-buttons or in other factors that one would have thought to be entirely arbitrary as a matter of morality are in fact of potentially crucial moral significance under the doctrines prof-fered by certain deontological philosophers, a result that would seem to require some defense.*⁵⁸

Indeed. It does seem strange that these factors that appear entirely morally arbitrary are in fact of crucial moral significance. But the only way to deprive them of such significance is to give up on some very basic precepts that Kaplow and Shavell, like everyone else, would find hard to give up on—the precepts spelled out earlier in this Article.

57. I pursued this point at some length in KATZ, ILL-GOTTEN GAINS, *supra* note 5.

58. KAPLOW & SHAVELL, *supra* note 7, at 347 n.106.

CONCLUSION

Situations can be constructed in which consent fails, though not for any of the familiar reasons, such as coercion, deception, incompetence, third-party effects, fears of commodification, unequal bargaining power, and various kinds of paternalistic concerns.

We began by considering one such situation, a stylized triage scenario, and then showed many more mundane cases to be instances where consent fails for analogous reasons—cases in which courts have been inclined to deny defendants the assumption-of-risk defense, without being sure why, or for which legislatures have created so-called victimless crimes, without being sure why, or cases in which courts refuse to specifically enforce personal service contracts even when the contract specifically provided for such enforceability. The controversy about tradeable pollution licenses is yet another such mundane instance.

The justification for disregarding consent is not so murky. It follows directly from some extremely simple, hard to dispute premises. For instance the idea that merely because X desires something more intensely than Y, he does not, as a result, have a stronger legal or moral claim to it—which is just another way of saying that there is a difference between claims and desires, interests and preferences.

How is it that recognizing the existence of claims and the fact that they are distinct from desires leads to the disregard of consent? Put very generally, what is going on is this: when the law recognizes a claim, it implicitly puts a value, or price, on something. When the law declares that people may impose a risk of a certain size on others for the sake of object X but not for the sake of object Y, or when it declares that people are required to take precautions of a certain amount to avoid inadvertently damaging object X but not object Y, or when it declares that people may use lethal force to protect X but not Y, or when it declares that people may commit a crime to avert harm to X but not Y, it is implicitly putting values on X and on Y, a high one on X, and a lower one on Y. When the owner of X or of Y agrees to exchange them for something else, he too is putting values on X and on Y, values that will often be different from the ones the law puts on them. But it is hard to have something be exchanged at one price in one context and at another price in another context. The coexistence of two such prices is apt to give rise to a tension that on occasion results in cycling.

This has bearing on the fairness-versus-welfare debate recently sparked by Kaplow and Shavell's new book. It shows that the Pareto principle, our most uncontroversial measure of welfare and the economist's term for freedom of contract, sometimes has to yield to fairness for reasons which, though quite different from the familiar ones, are nevertheless not in the least recondite but rather command universal assent.