Are Tradeoffs Between Justice and Welfare Possible? Calabresi and Dworkin on the Normative Foundations of Law and Economics

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ABSTRACT

Guido Calabresi claims, first, that the principal goals of accident law are justice and cost reduction, and second, that respecting the demands of justice is a constraint on the pursuit of cost reduction. “Cost reduction” should be read as “welfare enhancement,” and “justice” as “rights” or “equality.” I interpret the first claim to imply that justice and welfare are independently valuable goals the law may appropriately pursue (Both Justice and Welfare). That justice and welfare are independently valuable goals means that they may well conflict, in which case a tradeoff between them, and so a sacrifice in one of them, is inevitable. The main purpose of this Article is to provide a partial defense of this plausible assumption. Calabresi’s second claim should be taken to assert that the satisfaction of the goal of welfare cannot justify a failure to satisfy the goal of justice (Justice Before Welfare). On this reading, justice and welfare may conflict, but only those tradeoffs that favor justice are, all things considered, permissible. As I read it, Ronald Dworkin’s influential critique of Calabresi and normative law and economics generally seeks to reject Both Justice and Welfare. Officially, Dworkin’s critical target is the value of wealth, but I argue that the ultimate purpose of that critique strongly suggests that it targets the value of welfare. The critique claims that welfare depends for its value on justice in a way that renders tradeoffs between the two not just inappropriate or impermissible, but strictly impossible. Opting for the just option can never involve a tradeoff between justice and welfare or a genuine sacrifice in welfare value. I argue that Dworkin’s arguments fail to refute the claim that welfare has a value independent of justice, and so may conflict with it. In fact, considerations of the kind to which Dworkin appeals tend to confirm that welfare neither derives its value from justice nor depends on justice for its value. I conclude by arguing that tradeoffs between justice and welfare in favor of welfare

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are not only possible, but may also be morally permissible. Paradoxi-
cally, the rejection of Calabresi's Justice Before Welfare provides the
best case for his Both Justice and Welfare—and against Dworkin's
critique.
I. INTRODUCTION .................................................. 253
  A. The Issue .................................................. 254
  B. Justice as a Constraint .................................. 256
  C. Agenda .................................................... 256
II. INTERPRETATION ............................................. 257
  A. Justice ...................................................... 257
  B. Welfare .................................................... 260
  C. Both Justice and Welfare ................................ 265
  D. The Permissibility and Possibility of Tradeoffs ........ 266
III. DWORKIN'S CHALLENGE ...................................... 268
  A. The Critique of Wealth .................................. 269
  B. From Wealth to Welfare .................................. 271
IV. THE EXAMPLE-BASED ARGUMENT ................................. 274
  A. The Basic Problem ....................................... 275
  B. Another Problem ......................................... 275
V. IS WELFARE A VALUE? ........................................ 276
  A. First Modification and the Pareto Objection .......... 277
  B. Second Modification ..................................... 278
VI. TRADEOFFS BETWEEN JUSTICE AND WELFARE .................... 279
  A. Starting Afresh .......................................... 279
  B. Third Modification ...................................... 281
VII. THE ANALOGY-BASED ARGUMENT .............................. 282
  A. Recipe and Compromise .................................. 283
  B. The Cake Analogy ....................................... 285
  C. Calabresi's Response .................................... 286
VIII. JUSTICE AS A CONDITION .................................... 288
  A. The New Organizing Example ............................. 289
  B. The Standard Assumption ................................ 291
  C. The Unwilling Taxpayer .................................. 291
  D. The Willing Taxpayer .................................... 293
  E. The Weak Condition Thesis .............................. 294
IX. JUSTICE BEFORE WELFARE? .................................. 295
  A. Interpretation ............................................ 295
  B. Derek and Amartya, One Last Time ..................... 297
  C. Calabresi's Fungibility Theme .......................... 297
  D. Beyond Rights .......................................... 299
X. CONCLUSION .................................................... 300
I. INTRODUCTION

“What,” asks Guido Calabresi in The Costs of Accidents,¹ “are the principal goals of any system of accident law?”² “First,” he immediately answers, “it must be just or fair; second, it must reduce the costs of accidents.”³ We should read this statement in light of the fact that Costs is meant to be an application of a rather general approach to evaluating, criticizing, and reforming the law, namely law and economics. The great influence of Costs is surely owed to the fact that it has justifiably come to be regarded as a classic—perhaps the classic—application of this more general, and by now vastly popular, approach. This has at least three important implications.

The first is that Calabresi’s statement is not meant as an interpretive statement about the goals our current system of accident law actually serves, but rather as a fully normative statement about what goals it should serve: that our system fails to serve them is a reason to revise not the statement, but our law of accidents.⁴ This reflects the fact that law and economics is first and foremost an approach to evaluating our legal practices from an external perspective. Notice, second, that Calabresi’s declaration of goals does not seem to depend on any feature of accident (or tort) law in particular. If justice and cost reduction should be the principal goals of any system of accident law, it is only fair to ask: Why should they not also be the principal goals of the law generally? Finally, notice that it is not obvious why the statement should be confined to the law at all. Assuming that the law should pursue justice and cost reduction, perhaps this is so simply because these are the goals society as a whole should pursue, through the law or otherwise.

Indeed, when Ronald Dworkin takes Calabresi to task a decade after the publication of Costs over the goals of accident law,⁵ the issue

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² Id. at 24.
³ Id.
⁴ It is therefore not altogether clear that the familiar complaint that law and economics is incapable of explaining the bipolarity of accident law—the fact that tort adjudication connects particular injurers to their particular victims—applies to the strictly normative strand of law and economics that Calabresi exemplifies. Arguably, Calabresi is right to stress that there is no obvious reason to limit our search of accident law to a bipolar system. Id. at 22, 297-98, 302-05. But compare the sensitive criticism of Calabresian functionalism in Martin Stone, The Significance of Doing and Suffering, in PHILOSOPHY AND THE LAW OF TORTS 131 (Gerald J. Postema ed., 2001).
is understood to be completely normative and general. “Normative,” in that the question is not what goals our practices pursue but what goals they should pursue. “General,” in that the reference to the law on the whole, let alone accident law, recedes to the background. Rather than simply challenging Calabresi’s declaration of goals for accident law, Dworkin challenges the more basic assumption that both justice and cost reduction are independently worthy goals that the law in general may appropriately pursue. What is more, Dworkin seeks to deny this assumption by denying the more basic one, namely that both justice and cost reduction may be independently worthy goals or values, period.

It is precisely because this claim abstracts from the law altogether that it can challenge the economic approach to law at the most profound level. If the normative foundations of the economic approach can be shown to rest on a general mistake about values, then showing that this approach misunderstands the law is an optional extra. The profound nature of Dworkin’s critique may help explain its great influence.

A. The Issue

As we shall see in the next Part, Calabresi’s talk of cost reduction is best understood as elliptical—not for the accumulation of wealth but for the enhancement of welfare. His general claim is that justice and welfare should be the principal goals of accident law. Now it is natural to balk at the implication that justice and welfare should be the only principal goals of accident law, or of any other branch of the law for that matter. This, however, is clearly not what is at issue between Calabresi and Dworkin, and I shall have nothing to say about it here. At issue is only Calabresi’s assumption that both justice and welfare are independently valuable goals that the law may appropriately pursue. Call this Both Justice and Welfare. But as I have already noted, the issue is in fact more general than that. For Dworkin challenges this claim by challenging its first part: the claim that both justice and welfare are independently valuable goals. Indeed, his attack on Both Justice and Welfare depends not on any special feature of the law in

PRINCIPLE (1985) [hereinafter A MATTER OF PRINCIPLE]. Further citations to these articles will refer to the pagination of A Matter of Principle (with the exception of note 78 below).

6. There need not be a genuine difference between the goal of welfare (or welfare enhancement) and the goal of welfare maximization, provided only that “maximization” is not taken to exclude other goals. Under this inclusive reading, we could say that the maximization of both welfare and justice are appropriate goals of the law. Given the exclusive connotations of “maximization,” I prefer to simply talk about the goal of welfare or welfare enhancement.
particular, but rather on the very nature of the goals in question. It is a value-theoretic critique.

Now, as I hope will become clear, Dworkin's critique of Calabresi and normative law and economics is ambiguous in more than one respect. But as I hope will also become clear, there are some good reasons to read the critique as a challenge to the independence of welfare from justice. The assumption that both justice and welfare are independently valuable goals, appropriate for the law or for any other institution to pursue, presupposes that both are independently valuable goals. If two goals are independently valuable, then what satisfies one goal could well fail to satisfy the other. Put another way, the respective demands of justice and welfare may come apart without losing their intrinsic normative force. This does not suggest that justice and welfare are independent in the very strong sense that their respective demands are guaranteed to diverge. It only suggests that they are not guaranteed to converge: the option that satisfies the goal of justice to the highest degree (or the justice-maximizing option) and the option that satisfies the goal of welfare to the highest degree (or the welfare-maximizing option) may well be different options.

Perhaps the clearest way of making this point is by pointing to a familiar imagery that Both Justice and Welfare entitles us to invoke. Given this view, it makes perfect sense to assert that justice and welfare may come into conflict. And, of course, talk of conflicts between independently valuable goals legitimately breeds talk of regrettable yet necessary compromises, or tradeoffs. Since each goal retains at least some of its intrinsically normative force, any resolution of such a conflict would involve a loss or sacrifice of something of intrinsic value, namely justice or welfare.

There are two ways to challenge the assumption that justice and welfare are independently valuable goals that may conflict and require a tradeoff. The first is to deny that the value of justice is independent of welfare. According to utilitarianism, welfare is the only distinct, intrinsically valuable goal. It follows immediately that it is the only independently valuable goal. The utilitarian typically thinks that what we might regard as distinct considerations of justice are either reducible to considerations of welfare or else lack normative force. Dworkin takes the only other way of denying the said assumption: he denies that the value of welfare is independent of justice. To bring this critique, which obviously presupposes the value independence of justice from welfare, into focus, I shall assume for the sake of argument that

utilitarianism is false. The key question boils down to this: *Is the value of welfare independent from justice in the sense that entitles us to the tradeoff imagery?*

**B. Justice as a Constraint**

Calabresi’s Both Justice and Welfare implies not only that welfare is a distinct, intrinsically valuable goal, but also that it is valuable independently from justice: it may retain its intrinsic value in the face of countervailing justice considerations. But Calabresi also holds another thesis about justice and welfare (“cost reduction”), namely that the first is a *constraint* on the pursuit of the second: we are only permitted to pursue the goal of welfare insofar as the goal of justice is already satisfied. Again, the pursuit of welfare cannot justify a failure to pursue justice.⁸ Call this *Justice Before Welfare.* Now there seems to me to be a certain tension between this and Calabresi’s Both Justice and Welfare. After all, if welfare enjoys value independence from, and may conflict with, justice, why believe that it is *never* permissible to trade justice for welfare? It is important to notice, however, that the notion of justice as a constraint—even an absolute constraint—on the pursuit of welfare is *consistent* with the assumption that welfare’s value is independent from justice. The value independence of welfare from justice implies that the pursuit of welfare at the expense of justice may well involve a value tradeoff and sacrifice. It does not imply that such tradeoffs are morally permissible, always or sometimes.

**C. Agenda**

However general and perfunctory, Calabresi’s declaration of goals for accident law helps explain the sense of pluralism that makes his version of law and economics attractive. Its underlying assumption of Both Justice and Welfare is quite plausible. I shall try to provide it with a partial defense by repelling Dworkin’s challenge to the value independence of welfare—or at any rate, by repelling the challenge that Dworkin needs for his foundational critique of Calabresi or normative law and economics. I shall defend the view that welfare is valuable independent of justice in the sense that allows for value conflicts and tradeoffs between the two, the view that we can make perfect

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⁸ *The Costs of Accidents*, *supra* note 1, at 25-26. Echoing a familiar distinction, Calabresi remarks that justice is not exactly a goal but rather a constraint. *Id.* at 25. I will keep using the word “goal” to include all ethically relevant factors, including constraints. Thus, it can be the goal of the law to be just.
sense of the claim that trading welfare for the sake of justice may well involve a genuine loss or sacrifice.

Dworkin's critique of welfare equivocates between two claims. The first, which he never quite makes explicit, is that welfare, like wealth, is not a distinct, intrinsically valuable goal at all. The second claim concedes that welfare is indeed such a distinct goal, but asserts that the pursuit of justice is a condition on the pursuit of welfare. On this view, the intrinsic normative force of welfare is confined to cases in which it does not conflict with justice. This second, more complicated claim better reflects Dworkin's considered view, which is also at the center of his discussion of welfare and justice a decade after his original critique of law and economics.9

I shall argue that neither version of Dworkin's critique of welfare is convincing. Furthermore, I shall argue that the same considerations that confirm the possibility of tradeoffs between justice and welfare also confirm the common view that such tradeoffs are at least sometimes morally permissible. Even if we accept the view of justice as a constraint, the view that it is an absolute constraint is untenable. But of course, the fact that tradeoffs between justice and welfare are at least sometimes all-things-considered permissible or justifiable entails their possibility. The untenability of Calabresi's Justice Before Welfare provides a final reason to reject Dworkin's value-theoretic critique of Both Justice and Welfare.

II. INTERPRETATION

A. Justice

What is Calabresi's first goal, justice? There are two interpretive difficulties with this question. First, apart from Both Justice and Welfare and Justice Before Welfare, Calabresi has surprisingly little to say about justice.10 Second, his commitment to Justice Before Welfare,

10. Calabresi dedicates a section and the two final chapters to justice. THE COSTS OF ACCIDENTS, supra note 1, at 24-26, chs. 15-16. He notes: "if the elusiveness of justice cannot justify ignoring the concept, it at least justifies delaying discussion of it." Id. at 26. Indeed, he is skeptical about the fruitfulness of justice discourse in a way he is not about that of welfare discourse: "Justice, though often talked about, is by far the harder of the two goals to analyze." Id. at 24. Statements about the justice of an alternative accident law "are rarely backed up by any clear definition of what such support means, let alone by any empirical research into what is considered fair." Id. These plausible observations seem equally applicable to welfare, however. Just as no argument about what is just can be won by offering a definition of justice, no argument about what enhances welfare can be won by a definition of welfare (or costs). And arguments about welfare (or costs) can no more be resolved by
which as we shall see is quite false, gives him a powerful reason to interpret his justice goal out of existence, on pain of endowing certain moral considerations with an absolute priority they do not in fact have. As a result, he tends to assimilate what would otherwise be plausibly regarded as considerations of justice into welfare considerations.\footnote{Calabresi describes the goal of justice as "a catchall." THE COSTS OF ACCIDENTS, supra note 1, at 28 n.6. And yet, under his interpretation it almost seems to catch nothing. It is welfare—not justice—that is the catchall goal in Calabresi's account. Indeed, critics have expressed uncertainty over how seriously we should take Calabresi's claim that justice is a normative goal of accident law in its own right. See, e.g., Izhak Englard, THE SYSTEM BUILDERS: A CRITICAL APPRAISAL OF MODERN AMERICAN TORT THEORY, 9 J. LEGAL STUD. 27, 34-35 (1980); James R. Hackney, JR., "LAW AND NEOCLASSICAL ECONOMICS": A RESPONSE TO COMMENTARIES, 16 LAW & HIST. REV. 163, 166 (1998). Most tort law scholars simply ignore the justice part of his statement of goals altogether, and focus exclusively on cost reduction (welfare). See, e.g., ROBERT L. RABIN, PERSPECTIVES ON TORT LAW 209 (4th ed. 1995) (the most important contribution of \textit{Costs} is "the systematic presentation of general deterrence theory as a means of optimizing accident costs").}

My purpose in rendering "justice" is limited to making the most sense of Calabresi's Both Justice and Welfare and Dworkin's value-theoretic critique of normative law and economics. There seems to me to be two different senses of "justice" that are pertinent to the debate. For the most part, I shall interpret the goal of justice simply as the goal of respect for individual rights. It is crucial to establish that the rights in question are intrinsically normative or valuable moral considerations that are genuinely distinct from considerations of welfare. But I do not think it crucial to specify any particular working theory of rights.\footnote{The reason I feel it is safe to leave this notion unspecified is that virtually every plausible further specification would only make it easier for me to reject Dworkin's critique. In particular, rights are commonly conceived of as deontological constraints, namely considerations that render at least some welfare-maximizing choices impermissible. In fact, this is how rights figure in Dworkin's own theory of rights. The trouble is that if at least some tradeoffs of rights for welfare are impermissible, then at least some such tradeoffs are possible, after all. Dworkin's critique requires that tradeoffs between justice and welfare be neither permissible nor impermissible (see Parts II.D and III below); the common notion of rights as deontological constraints entails that some such tradeoffs are impermissible.} 

Both Calabresi and Dworkin seem to think of justice in terms of individual rights. Calabresi's few explicit examples of justice feature paradigmatic rights, such as so-called inalienable human rights. For example, an accident law system that reduced accident costs "by 10 percent by beheading all people who knowingly run red lights" would
still be unjust. Presumably, the thought is that the system would be unjust because it violates people's inalienable right to life. Given Justice Before Welfare, Calabresi also thinks that such a system would be, all things considered, impermissible. But we do not have to accept Justice Before Welfare in order to reject the decapitating reform. We could plausibly maintain that rights defeat welfare considerations only within a certain range of cases, and that the present case falls well within this range. This would allow us to extend our repertoire of rights beyond the most fundamental ones, without automatically committing ourselves to the counterintuitive view that welfare is always doomed to be defeated by rights.

Interpreting the goal of justice as the goal of respect for rights is also the most natural way of reading Dworkin's critique of Calabresi and normative law and economics. As we shall see in Part IV, the organizing example of his critique features a violation of a paradigmatic right, namely a private property right.

The other conception of justice that seems pertinent to the debate is distinctly distributive. Both Calabresi and Dworkin are preoccupied with problems of distribution. Calabresi treats the central problem of Costs as one of distribution, namely how to allocate the costs associated with accidents or their avoidance. The various accident regimes he considers, including his favored regime of strict enterprise liability, are supposed to be alternative solutions to this problem. It is true that the official position of Costs systematically treats considerations bearing on the distribution of accident costs as just more aggregative welfare considerations. First, however, there are difficulties with this approach. Second, and in any event, Calabresi himself seems to have abandoned it. Soon after Costs, he begins

13. The Costs of Accidents, supra note 1, at 293.
14. Id. at 20-21.
15. To be accurate, Calabresi argues that strict enterprise liability is among the systems that are preferable to the fault system. See id. at 312; see also Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055 (1972).
16. In particular, it treats "economic and social dislocations," which other economists regard as problems of distributive justice, as ("secondary") welfare costs. See The Costs of Accidents, supra note 1, at 24 n.1, 27 n.4, 28 n.6; Guido Calabresi & Kenneth C. Bass III, Right Approach, Wrong Implications: A Critique of McKean on Products Liability, 38 U. Chi. L. Rev. 74, 75-76 (1970); cf. Hackney, Reconfiguration, supra note 10, at 313-14 (Calabresi's treatment of economic dislocation as a (secondary) cost is forced, because "it constitutes an argument based on the normative goal of redistributing wealth").
17. In particular, it conflicts with the plausible notion that there may be a morally significant choice between alternative distributions of accident costs that do not affect welfare or affect it equally. It is plausible to assume that some of the considerations that bear on the correctness of a distribution are essentially backward-looking and so nonwelfarist. For example, it is plausible to think that allocating goods or ills to those who personally deserve
to treat distribution as a goal distinct from, and independent of, welfare enhancement.  

Dworkin, too, likes to conceive of justice in terms of distribution or equality, as well as in terms of individual rights. As we shall see, the organizing example of his more recent discussion of the relation between justice and welfare features redistributive taxation that aims at equality in the distribution of resources.

B. Welfare

I have been assuming that the controversy between Dworkin and Calabresi concerns the goal of welfare and its relation to justice. But what is the basis for this assumption? The second goal Calabresi thinks every system of accident law should have is “cost reduction,” not “welfare.” And the titles of the two articles that contain Dworkin’s critique target “wealth” and “efficiency.” Surely, one might naturally complain that the notion most pertinent to the debate is wealth or economic efficiency, and not welfare?

But appearances are misleading in this case. Dworkin’s critique of Calabresi has the larger purpose of refuting the “political theory about law often called the economic analysis of law,” of showing that it “lacks any defensible philosophical foundation.” Calabresi is widely regarded as a moderate representative of this general approach. If it could be shown that even Calabresi’s version rests on a false value theory, then presumably normative law and economics as a

\[\text{See generally George Sher, Desert (1987).}\]

18. Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1098-99, 1102-05 (1972) [hereinafter The Cathedral]. He regards “as distributional all those effects of liability rules which do not relate to minimizing (a) the sum of accident costs and avoidance costs, and (b) the administrative costs entailed by that minimization.” Calabresi & Hirschoff, supra note 15, at 1078. In more recent work, Calabresi repeatedly describes distribution as a goal distinct from welfare. See, e.g., Guido Calabresi, First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?, 69 Iowa L. Rev. 833, 836 (1984) (since the parties who win or lose are different under alternative accident systems, “the choice among these approaches is significant not only because of its effects on accident costs but also because of its distributional consequences”); see also Gregory C. Keating, The Theory of Enterprise Liability and Common Law Strict Liability, 54 Vand. L. Rev. 1285, 1287, 1308-17 (2001) (openly grounding Calabresian strict enterprise liability in a principle of distributive justice).


whole could be said to rest on a mistake. Since the importance of the debate depends on its capacity to illuminate the normative foundations of law and economics, Calabresi’s position should be interpreted so as to make the best sense of this approach.

But given Dworkin’s proper assumption that Calabresi means “cost reduction” as a distinct, intrinsically valuable goal, to interpret it as wealth maximization is to shortchange normative law and economics. Such an interpretation would render the value theory behind Calabresi’s version of law and economics anything but moderate. To be sure, some brave souls seem to have entertained the idea that wealth is an intrinsically valuable goal, regardless of its contribution to welfare. But this seems quite wrong. On the face of it, wealth as such is just a resource whose entire value lies in its capacity to generate welfare: its value is purely instrumental.

I should think that the overwhelming majority of legal economists view wealth not as something that may be worth having for its own sake (in Dworkin’s nomenclature, a “component of value”), but rather as something that may be worth having for the sake of something else that is indeed valuable in itself, and which is variously called “utility,” “happiness,” or “well-being.” Or “welfare,” as I shall call it.

Whatever else they may be guilty of, the proponents of normative law and economics are no “fetishist[s] of little green paper.”

Now to my ear, “wealth” and “money” (or “buying power”) are largely interchangeable terms (a wealthy person is a person who has a great deal of money or buying power). And it is hard to see how one can plausibly conceive of money or buying power as anything other than a mere resource. But when Dworkin writes about wealth, he seems to have a rather nonstandard conception of wealth in mind. In this conception, which is taken directly from Richard Posner, wealth is maximized when resources are in the hands of those who are (or would be) willing and able to pay the most money for them. Put differently, one’s wealth consists of having what one is willing and able to pay for. It seems to me that this conception of wealth is better described as a theory of welfare—more specifically, as a particular preference theory of welfare. According to this theory, welfare consists in


25. See id. at 237; see also Posner, The Value of Wealth, supra note 23, at 243.
the satisfaction of all and only the preferences that are backed by ability and willingness to pay money. (To say that my preference for something is satisfied is simply to say that I actually get it.)

But I do not think we need to agree on the right theory of welfare to agree that this one will not do. It is simply not true that one’s welfare consists of having what one is willing and able to pay for. Obviously enough, one’s inability to pay for some good that one wants, such as an expensive medicine or better health care (that is better than the health care one is currently enjoying), hardly shows that the wanted good is not good for one, that one’s life would not go better if one had the good. (And the mere fact that someone else is willing and able to pay more for the same good hardly shows that the good would contribute more to the welfare of this other person than to that of the first. Accordingly, the handing of goods to those who are willing and able to pay the most for them does not necessarily increase overall welfare.) In addition, even if one is in fact able to pay, one’s willingness to do so may be uninformed, mistaken, irrational, or otherwise misguided. The fact that one is both willing and able to pay for spiting one’s face, for example, hardly tends to show that doing so would be good for one. One’s willingness to pay for a good may well express one’s wish to have it. But whether making the wish come true will actually make one’s life go better also depends on whether one has good reasons to have the wish in the first place.26

Whether or not you agree with me that wealth in the said non-standard sense is best described as a theory of welfare is beside the point. What is important is that wealth in this sense cannot plausibly be said to have intrinsic normative significance or value. Indeed, the reasons to reject this conception of wealth as a theory of welfare are also reasons to think that it is not an intrinsically valuable factor in its own right, apart from welfare. They are reasons to think that wealth cannot have intrinsic normative significance unless it constitutes welfare. It seems to me that once it is admitted that increasing one’s wealth (or total social wealth) need not increase (and may even decrease) one’s welfare (or total social welfare), it must also be admitted that increasing wealth need not increase anything that is intrinsically valuable. Imagine a case in which a good is given to one who does not need it in the slightest but who is willing and able to pay most for it, rather than to one who desperately needs it. Presumably, no one would be tempted to claim that the increase in overall wealth in this

case represents an increase in overall welfare. In fact, it represents a decrease in overall welfare (relative to the other available distributive option). But then it is hard to believe that the increase in wealth represents an increase in anything of intrinsic normative significance. Where could the additional intrinsic value possibly come from?27

On any plausible interpretations of “wealth” and “welfare,” maximizing wealth does not necessarily maximize welfare. In fact, it is plausible to regard the allowance of a significant discrepancy between welfare and wealth as a condition of adequacy on theories of welfare. This still leaves a large room for controversy over the nature of a welfare worth having. The important point is simply the eminently plausible assumption that such a significant discrepancy is possible. Moreover, the possibility of such discrepancy means that wealth—on any plausible interpretation of this concept—is not an intrinsically normative goal. The accumulation or maximization of wealth as such can only have conditional value.

Still, wealth may contribute to welfare, and it may do so in two different ways, depending on the particular conception of wealth at work. On the standard conception (wealth as money), wealth is simply a means to the acquisition of welfare. As such, it is clear enough, its value can only be instrumental. On the nonstandard conception (wealth as the satisfaction of preferences backed by willingness and ability to pay), wealth may contribute to welfare in a somewhat different way, which we may or may not wish to refer to as instrumental. Supposing that some preference theory of welfare is correct, welfare consists of the satisfaction of certain preferences. But under the nonstandard conception, wealth, too, consists of the satisfaction of certain preferences: those that are backed by willingness and ability to pay.

27. I should note that Posner, who at some point comes very close indeed to holding that wealth is valuable for its own sake, later disclaims this view and affirms “the instrumental character of wealth maximization.” Posner, The Value of Wealth, supra note 23, at 244-45. However, it is not entirely clear that Posner has given up on the intrinsic normative standing of wealth. See, e.g., Richard A. Posner, Economic Analysis of Law 13 (5th ed. 1998) (treating both happiness (welfare) and efficiency (wealth maximization) as imperfect “ethical criteria of social decisionmaking,” and stating that “the book does assume, and most people probably would agree, that [wealth maximization] is an important criterion”). This seems to suggest that wealth and welfare are on a par, ethically speaking: neither is the sole ethical criterion but both are intrinsically normative. But on a par they are not. It is eminently plausible to think that welfare is at least one intrinsically normative ethical factor. It is not very plausible to think that wealth is such a factor. Cf. id. at 15 (economics does not “answer the ultimate question whether an efficient [wealth-maximizing] allocation of resources would be socially or ethically desirable”). This may or may not be true with respect to positive economic analysis. But surely, normative law and economics must presuppose that efficiency or wealth maximization is ethically desirable? Which is not to presuppose that its ethical desirability is intrinsic.
Now a preference that is backed by a willingness and ability to pay may well be a preference the satisfaction of which is constitutive of welfare. In such a case, satisfying the preference would enhance both wealth and welfare. Since enhancing wealth in such a case automatically (without more) increases welfare, it might be misleading to say that wealth is merely a means to welfare. Perhaps it is more accurate to say that wealth constitutes welfare—as long as we remember that the constitutive contribution of wealth to welfare is a contingent feature of the particular case. Or either way, the result is that welfare can be enhanced by enhancing wealth. And this suggests that, at least within certain ranges of cases, we might be justified in treating wealth as a proxy of welfare.

Or so it is often assumed in the law and economics literature. Now, given any adequate account of welfare, just how good a proxy of welfare wealth can be is an empirical question. Apparently the prospects of a general informative answer to this question are dim. We should probably expect the answer to vary considerably from one range of cases to another.

The important point for our purposes is the plausible one that wealth enhancement is valuable derivatively rather than as a final goal. It can only be regarded as a worthy goal (of the law or any other institution) to the extent that it reliably enhances welfare.

I believe that this is the best way of characterizing Calabresi's approach to wealth or economic efficiency. If I am right, Calabresi's talk about "costs," "benefits," and "prices" is first and foremost about welfare costs, benefits, and prices, and only secondarily about wealth or economic efficiency. The latter are logically derivative of, or secon-

28. This way of speaking is not quite accurate, because the contingent nature of the contribution also tends to suggest that it is not one of constitution. Wealth, it might be plausibly said, can coexist or overlap with, but can never quite constitute, welfare. On this way of looking at things, wealth's contribution to welfare is always instrumental. But as far as I can see, nothing in my argument turns on the resolution of this largely terminological difficulty.


30. Calabresi divides costs into three categories: primary, secondary, and tertiary. THE COSTS OF ACCIDENTS, supra note 1, at 26-28. In principle, these three categories together may be taken to cover every imaginable setback to individual welfare. He sometimes uses "costs" to refer directly to utility or welfare costs: "The word 'costs' is here used in a broad way to include all the disutilities resulting from an accident and its avoidance. As such it is not limited to monetary costs, or even to those which could in some sense be 'monetizable' . . . ." Calabresi & Melamed, The Cathedral, supra note 18, at 1094 n.11.
dary to, the former. The normative claim he makes on behalf of economic efficiency or wealth is therefore essentially conditional upon its tendency to contribute to personal welfare, constitutively or instrumentally. To put it crudely, the cogency of Calabresi’s declaration of goals would not be affected even if it turned out that the enhancement of wealth has no tendency to generate welfare.\textsuperscript{31}

\textbf{C. Both Justice and Welfare}

Let me explain the view I attribute to Calabresi and why I find it attractive. Both Justice and Welfare says that both justice and welfare are independently valuable goals that are appropriate for the law to pursue. It is the first part of this thesis—the claim that justice and welfare are independently valuable goals—that constitutes the fundamental normative premise of Calabresi’s version of law and economics and his value pluralism. I believe that this is also the main bone of contention between him and Dworkin. Dworkin clearly assumes that if justice and cost reduction were independently valuable goals, then it would be appropriate for the law to pursue both of them. He just thinks the antecedent of this condition is false. Or so I would venture to read him.

We can break the value-independence claim into two assumptions. The more basic assumption is that each of these two goals is intrinsically valuable: each may be worth having for its own sake rather than simply for the sake of some other goal. All other things being equal, more justice in the world means more value in the world; all other things being equal, more welfare in the world means more value in the world. This assumption is immensely plausible, but it is also too weak to ground a minimally robust value pluralism. A value pluralism worth its name must leave conceptual room for value conflicts. Yet, at least from a purely logical viewpoint, the fact that justice and welfare are both intrinsically valuable goals is compatible with a perfectly harmonious picture of the relation between these two goals, a picture in which they never stand in each other’s way.

\textsuperscript{31} That said, it is overwhelmingly likely that the enhancement of wealth tends to enhance welfare within significant domains of our lives. Health, for example, is a component of welfare if anything is. No one can seriously deny the strong positive correlation between wealth and health, both at the level of individuals and at the level of nations. Now you might find this state of affairs morally objectionable. Presumably, you would wish to change it by making the poor healthier. And yet one obvious way of making the poor healthier is by making them wealthier, which only reinforces the correlation. (How easy is it to make some person or nation healthier \textit{without} also making it wealthier?) This tends to show that what you might find objectionable in the state of affairs is something other than the correlation itself.
The second assumption that underlies Both Justice and Welfare is designed to rule out this harmonious picture. It says that justice and welfare are independently valuable in precisely the sense that ensures their potential rivalry. We can define value independence counterfactually by saying that two goals are independently valuable of each other just in case what satisfies one of them might be the same even if what satisfies the other were different. This is just a convenient way of capturing the value-pluralistic conviction that the respective demands of justice and welfare may come apart. The idea is not to deny the interplay between the two goals. Indeed, the thought that what welfare favors depends in part on what justice favors, like the thought that what justice favors depends in part on what welfare favors, is very congenial. The idea, rather, is that such a blissful interplay is by no means guaranteed by the very nature of these two goals.

In case of a conflict between justice and welfare, we are forced to adjudicate between the incompatible demands of two genuine distinct values. Whatever the all-things-considered correct choice may be in such a case, it would amount to a tradeoff and involve a sacrifice. The correctness of the all-things-considered choice goes to show that the loss in question is justified. All the same, it is a genuine loss, because whichever option we choose is actually worse in some genuine respect than at least one of the options we forego. This is the idea that "our goals and methods conflict with one another at times and preclude the complete achievement of any particular one."  

D. The Permissibility and Possibility of Tradeoffs

There is one more basic interpretive question we need to attend to before we can proceed. The debate between Dworkin and Calabresi is about whether we should "allow for," or "tolerate," or think it "makes sense" to talk about, tradeoffs between justice and welfare. But this is all rather ambiguous. In fact, the debate is marred by a failure to distinguish clearly between the permissibility of tradeoffs and their very possibility (or occasional actuality). On Dworkin's side, this failure results in creating the false impression that Calabresi believes such tradeoffs are permissible. More confusing still, when Dworkin finally corrects this impression, Calabresi responds by creat-
ing the false impression that he, Calabresi, has never believed that such tradeoffs are possible!  

We cannot understand the debate unless we understand that it is about the possibility, not the permissibility (or justifiability), of tradeoffs between justice and welfare. The permissibility of such tradeoffs is not irrelevant. But as we shall see later, its only relevance is to the question of their very possibility.

The point can be brought home by asking this question: How can Calabresi be said to hold Both Justice and Welfare, which tolerates tradeoffs between justice and welfare, when he holds Justice Before Welfare? Surely, the latter doctrine makes justice an absolute constraint on the pursuit of welfare. This surely precludes the trading off of justice for welfare? In his own words: “we would not tolerate tradeoffs between justice and economic efficiency.”

We can make sense of the debate if, but only if, we take Calabresi to reject tradeoffs of justice for welfare in the sense of holding that they are never morally permissible, but at the same time to accept that conflicts between justice and welfare are possible and sometimes actually occur. Indeed, why insist on the moral imperative not to trade justice for welfare if doing so were not even possible? As Dworkin aptly puts it, the “veto power” with which Calabresi vests justice “nevertheless supposes that a trade-off is in question—that it is, that is, conceptually on the cards.”

The only question, then, is whether tradeoffs between justice and welfare are indeed in question or conceptually on the cards.

33. Guido Calabresi, About Law & Economics: A Letter to Ronald Dworkin, 8 Hofstra L. Rev. 553, 557 (1980) [hereinafter Letter to Dworkin] (“I do not, and never have, held that one can trade off efficiency and justice.”). But is this the modal “can” of possibility or the moral “can” of permissibility?

34. The Costs of Accidents, supra note 1, at 28 n.6.

35. Notice that on this view, tradeoffs of welfare for justice are not only permitted but also required.


37. Incidentally, Dworkin’s position here seems to stand in stark contrast with his theory of rights in Ronald Dworkin, Taking Rights Seriously (1977). Despite its declared “anti-utilitarian” nature, id. at 269, this theory implicitly acknowledges both the intrinsic and the independent value of general welfare. First, despite the leading metaphor of rights as trump over general welfare, general welfare may also trump rights:

Someone who claims that citizens have a right against the Government need not go so far as to say that the State is never justified in overriding that right. He might say, for example, that although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit . . . .

Id. at 191. Of the idea that rights trump utility considerations, all that seems to remain is the idea that they trump unclear or minor utility considerations. See also Joseph Raz, Profes-
III. DWORKIN'S CHALLENGE

In two articles published a decade after Costs, Dworkin takes Calabresi to task over the normative goals of accident law—indeed, over the normative goals of the law in general.\(^3\) Dworkin's purpose is the ambitious one of rejecting law and economics as a normative theory, namely as an approach to evaluating, criticizing, and reforming the law. His aim is to reject this theory root and branch by showing the roots—namely the underlying value theory—to be no good. Dworkin's claims and arguments in these papers are not always easy to follow, but are always suggestive. What is more, they have proved to be particularly influential and are sometimes taken to have delivered a decisive blow to the normative aspirations of law and economics in general. Indeed, the critique has proven so influential that it has led Calabresi himself to comment that he has never really disagreed with it!\(^39\)

\(\text{so} \text{r Dworkin's Theory of Rights, 26 Pol. Stud. 125, 126 (1978) ("Nowhere does [Dworkin] say clearly and unambiguously anything more than that rights have some weight however little and may override some considerations which aren't themselves rights."}). \text{Second, in the absence of rights to the contrary, general welfare may justify the government in limiting liberty: "The vast bulk of the laws which diminish my liberty are justified on utilitarian grounds." Dworkin, supra, at 269. Third, the existence of a right to "equal concern and respect" may be denied by appeal to general welfare, provided only that this denial is not "antecedently likely to give effect to external preferences." Id. at 278. Finally, Dworkin seems to avail himself of the same imagery of tradeoffs to which he claims Calabresi is not entitled. For example:}

- The prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do . . . . There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient.

\(\text{Id. at 193 (emphasis added). On the significant utilitarian elements in Dworkin's theory of rights, see H.L.A. Hart, Between Utility and Rights, 79 Colum. L. Rev. 828, 836-46 (1979), reprinted in H.L.A. Hart, Essays in Jurisprudence and Philosophy 198 (1983). Notice that the most fundamental apparent inconsistency between Dworkin's theory of rights and his critique of Calabresi does not depend on the above-mentioned details of his theory of rights. Rather, the most basic inconsistency is threatened by the simple fact that Dworkin shares the common view of rights as deontological constraints. As I have already mentioned (in note 12 above), this view clearly implies that some tradeoffs between rights and welfare are impermissible. Dworkin's critique of Calabresi states that tradeoffs between justice and welfare are neither permissible nor impermissible—they are strictly impossible. (This point will be reemphasized shortly, in the next Part.) Provided I'm right that it is most reasonable to take "justice" in the debate to denote rights, we have an apparent contradiction. Be that as it may, I shall largely try to understand Dworkin's critique of normative law and economics as a self-standing doctrine and ignore those parts of his other views that do not sit comfortably with it.}

\(\text{38. Dworkin, Is Wealth a Value?, supra note 5; Dworkin, Why Efficiency?, supra note 5.}

\(\text{39. See Calabresi, Letter to Dworkin, supra note 33, at 553 n.1 ("It seems to me that the differences between him and me are largely verbal . . . ."). I will take this response up later.}
My own view is that Calabresi should disagree. In this and the following Parts I will take Dworkin's argument apart. I will try to show why, despite its trading on various sound and valuable insights, the argument ultimately fails to deliver on its self-advertised promise to shake the normative foundations of the economic approach to law.

The burden of this Part of the Article is to describe and explain the content of Dworkin's challenge. I will leave the discussion of his arguments to the Parts that follow. Perhaps the greatest interpretive difficulty is created by Dworkin's equivocation on whether his critique concerns wealth or welfare. I have already addressed the issue in the discussion of welfare in Part II, but the problem is sufficiently important to merit re-emphasis. I shall first describe Dworkin's official project, his critique of the goal of wealth or wealth maximization. I shall then present what I think are powerful reasons to read it as a critique of the goal of, first and foremost, welfare. By giving these reasons, I hope to earn the right to go beyond the critique of wealth and proceed on the assumption that the goal that is really at issue is welfare.

A. The Critique of Wealth

As we shall see in Part VIII, Dworkin's more recent thoughts about the tradeoff issue concern the value of welfare or well-being, not wealth. It is true, however, that the official target of his original, 1980 critique is the goal of wealth or wealth maximization, not welfare. The target, however, is not the familiar and very strong claim that wealth should be the only goal of the law—that the law should maximize wealth or efficiency single-mindedly—but rather the much weaker claim that the law should pursue the goal of wealth or wealth maximization at all. Specifically, Dworkin targets "the idea that justice and social wealth may sensibly be traded off against each other, making some sacrifice in one to achieve more of the other," and the notion that the goals of justice and wealth "may sometimes conflict so that a 'political' choice is needed about which goal should be pursued." Dworkin's own official view then seems to be that justice and social wealth can never conflict. This is what he seems to be saying when he says that "[n]one of these interpretations of the trade-off between justice and wealth makes sense."

40. See DWORKIN, Is Wealth a Value?, supra note 5, at 246 ("I did not argue that maximizing social wealth is only one among a number of plausible social goals, or is a mean, unattractive, or unpopular social goal. I argued that it makes no sense as a social goal, even as one among others.").
41. Id. at 246.
42. Id. at 249.
To be sure, it may be natural to think that, in saying that talk of trading off justice for wealth does not “make sense,” Dworkin is claiming that such tradeoffs are inappropriate or even impermissible (or unjustifiable). Indeed, the paper in which he first unleashes the critique of Calabresi (Is Wealth a Value?) does not explicitly rule this interpretation out. Yet, as soon as Dworkin realizes the potential ambiguity of his claim, he writes another paper (Why Efficiency?) that disambiguates it, with a clear view to save the controversy. He emphasizes that his claim is not the first-order one that we are never morally permitted to trade off justice for welfare. That claim, he acknowledges, would fail to engage Calabresi’s position, which includes the doctrine that justice is a constraint on welfare enhancement. Dworkin’s claim is the second-order one that there can be no conflicts, and so no tradeoffs, between justice and wealth in the first place. For him, Calabresi’s notion that it is never permissible to sacrifice justice in the cause of wealth makes no more sense than the otherwise diametrically opposed notion that this is always permissible!

Dworkin’s claim is entirely general and value theoretic. He is after Calabresi’s supposed value theory “that social wealth is worth pursuing for some reason distinct from justice.” If we are to choose the all-things-considered morally best society, he asks, “why should not its justice alone matter?” One possible answer, he says, is that justice, in the “ordinary language” or “political philosophy” sense, “is not the only virtue of a good society.” The other possible answer concedes that justice in that relatively wide sense is indeed the only virtue of a good society, but insists that the good society has virtues other than justice in the narrower, “distributional” or “desert” sense. Dworkin rejects both answers because they both assume that wealth maximization is a component of social value. In the first, wealth maximization is treated as a component competitive with justice and, in the second, as a component of justice but competitive with other components of that concept. Both replies fail, for that reason. It is absurd to consider wealth maximization to be a component of value, within or without the concept of justice.

What does Dworkin mean by saying that wealth is not a value or a component thereof? For him, some putative goal or value is a compo-

43. DWORKIN, Why Efficiency?, supra note 5, at 262.
44. DWORKIN, Is Wealth a Value?, supra note 5, at 248.
45. Id.
46. Id.
47. Id.
nent of value just in case it is “worth having for its own sake,” or worthy of our appreciation when “considered in itself.”48 By “value,” in other words, Dworkin seems to mean what is often called intrinsic, non-instrumental value. Roughly speaking, an intrinsically valuable or normative goal is a goal worth satisfying not simply as a means to the satisfaction of some other goal but at least partly as a distinct basic goal in its own right. Somewhat differently, but still in the same vein, we can say that a goal has intrinsic value just in case, all other things being equal, a world in which the goal is satisfied is better, or has more value, than a world in which it is not satisfied.

I would like to pause to observe the strength of Dworkin’s claim by emphasizing the weakness of his component-of-value condition. In denying that wealth is a component of value, Dworkin seems to claim somewhat more than is absolutely necessary to preclude tradeoffs between wealth and justice. This much he could achieve by insisting that wealth’s value depends on justice: whether wealth exerts intrinsic normative force in any given case depends on whether justice has already been given its due. Such insistence would not imply that wealth never exerts intrinsic normative force, that its value is entirely derivative of justice. It would allow that, as long as justice is satisfied, wealth may exert basic, nonderivative intrinsic normative force. Instead, Dworkin chooses to deny the possibility of tradeoffs between wealth and justice by denying wealth’s most basic claim to be a distinct, intrinsically valuable goal.

B. From Wealth to Welfare

Dworkin takes Calabresi’s cost reduction goal to be the goal of maximizing social wealth or economic efficiency. He takes him to hold “the theory that social wealth is worth pursuing for some reason distinct from justice.”49 There are, however, powerful reasons to resist this reading—at least insofar as the reason in question is supposed to lie in the intrinsic value of wealth. In particular, there are powerful reasons to believe that Dworkin’s challenge is first and foremost about the value of welfare.

First, Dworkin’s criticism can only engage Calabresi’s position if it is taken to apply to the goal of welfare as well. As I pointed out in Part II, Calabresian costs and benefits are best conceived of as welfare costs and benefits. There is no special reason to saddle him with the view that wealth is a component of value in the sense of being valuable for

48. Id. at 240, 242.
49. DWORKIN, Why Efficiency?, supra note 5, at 267.
its own sake. On the contrary, it is more than reasonable to attribute to Calabresi the view that wealth is valuable for the sake of welfare.\footnote{50}

More important, Dworkin himself has a compelling reason to endorse my reformulation of his challenge in terms of welfare rather than wealth or efficiency. This is because the declared ultimate purpose of his challenge, as we have already seen, is to refute the "political theory about law often called the economic analysis of law," to argue that the economic approach in general "lacks any philosophical foundation." No doubt any version of this normative theory claims that the promotion of social wealth or economic efficiency may be a worthy goal for the law to pursue. But this does not yet tell us that wealth is worthy of pursuit in its own right. At the same time, the claim that welfare is intrinsically valuable is clearly the most plausible candidate for playing the role of the value theory behind the widespread contemporary appeal to wealth or efficiency. On this interpretation, the value claim that normative law and economics makes on behalf of wealth is essentially conditional. Specifically, it is conditional upon the assumption that the promotion of social wealth promotes social welfare. When the assumption is not justified, the value claim is automatically withdrawn.

Given Dworkin's explicit aspiration to reject normative law and economics root and branch, he should extend his critique beyond a particular—indeed, tendentious—branch of that theory.

Dworkin could reply in the following manner. The original critique really refutes two kinds of claims on behalf of normative law and economics. In addition to the claim that wealth is a distinct, intrinsically valuable goal that is appropriate for the law to pursue, the critique also refutes the claim that wealth is an instrumentally valuable goal that is appropriate for the law to pursue. The champion of the economic approach must choose between these two kinds of claims. But it does not matter which claim he chooses because both have been shown to be without warrant.\footnote{51}

\footnote{50. Remember that even Posner, who flirts with the view that wealth is valuable for its own sake, at some point disclaims it and asserts that the value of wealth maximization is instrumental. Posner, The Value of Wealth, supra note 23, at 244-45. (But cf. supra note 27, where I note that Posner's considered view is somewhat ambiguous.) Dworkin responds to this by saying that his critique "was designed only to show, if it needed showing, that wealth could not be supposed to be valuable for its own sake." Dworkin, A Reply, supra note 20, at 295 (emphasis added). This may or may not cut ice against Posner, but it certainly cuts no ice against Calabresi and most other economic analysts who have not been tempted by the view that wealth is a factor of intrinsic ethical significance. Cf. also infra note 71.}

\footnote{51. Cf. Dworkin, Is Wealth a Value?, supra note 5, at 240-41. Here Dworkin enumerates five interpretations of normative economic analysis. The first two regard wealth as intrinsi-
But I do not think Dworkin’s discussion of the instrumental views is pertinent to the tradeoffs debate. As he notes, these versions of economic analysis are incompatible with the possibility of tradeoffs between justice and wealth. But surely they leave intact the possibility of tradeoffs between justice and welfare. What is more, the instrumental claims at issue are, at bottom, empirical generalizations. Even if Dworkin’s discussion successfully undermined them, it would not affect the most fundamental normative premise that informs economic analysis, to wit, that welfare is an intrinsically valuable goal that is appropriate for the law to pursue, either directly or through the pursuit of wealth, that is in cases where wealth can be shown to be conducive to welfare.

For these reasons, it is reasonable to examine how Dworkin’s critique would fare as a view about justice and welfare, not simply justice and wealth. Now, admittedly, the claim that welfare is not intrinsically valuable scarcely enjoys the overwhelming plausibility of the claim that wealth is not intrinsically valuable. On the face of it, all other things being equal, a world in which even one person enjoys more...
welfare is better than a world in which that person has less. But even if Dworkin’s critique can do without denying the distinct, intrinsic value of welfare, it certainly cannot do without denying the kind of value independence that would enable welfare to conflict with, and be traded off against, justice. We shall see that Dworkin also seems to endorse this denial in his more recent reflections on justice and welfare. In any event, this denial is absolutely essential to his value-theoretic critique of law and economics.

Our primary question shall therefore be whether it is possible for justice and welfare to conflict. Moreover, in Part VIII, I shall specifically examine Dworkin’s considered view, which seeks to deny welfare’s independence from justice without also denying its claim to intrinsic value.

IV. THE EXAMPLE-BASED ARGUMENT

The story of Derek and Amartya is the linchpin of Dworkin’s critique:

Derek has a book Amartya wants. Derek would sell the book to Amartya for $2 and Amartya would pay $3 for it. T (the tyrant in charge) takes the book from Derek and gives it to Amartya with less waste in money or its equivalent than would be consumed in transaction costs if the two were to haggle over the distribution of the $1 surplus value. The forced transfer from Derek to Amartya produces a gain in social wealth even though Derek has lost something he values with no compensation. Let us call the situation before the forced transfer takes place “Society 1” and the situation after it takes place “Society 2.” Is Society 2 in any respect superior to Society 1? I do not mean whether the gain in wealth is overridden by the cost in justice, or in equal treatment, or in anything else, but whether the gain in wealth is, considered in itself, any gain at all. I should say, and I think most people would agree, that Society 2 is not better in any respect.54

Dworkin clearly regards this story as a decisive counterexample to the claim that wealth is a component of value; a proof that wealth is not a distinct, intrinsically valuable goal at all.55

54. DWORKIN, Is Wealth a Value?, supra note 5, at 242.
55. For example, he later states that the Derek-Amartya story shows the failure not only of the immodest but also of the modest version of the theory that social wealth is a component of value. . . . It shows that a gain in social wealth, considered just in itself, and apart from its costs or other good or bad consequences, is no gain at all.
I disagree. As we shall see, Dworkin's argument does not even support the weaker view that wealth's value depends on justice in a way that precludes conflicts between the two.

A. The Basic Problem

Dworkin assumes that "most people" would say Society 2 is "not better in any respect" than Society 1. But the most Dworkin is entitled to assume "most people" would say is that Society 1 is clearly better than Society 2, that is to say, clearly better overall. Surely, to assume more—namely that Society 2 is in no way better, not even pro tanto—is to beg the question against those who think that wealth is valuable independent of justice in such a way that the two goals may come into conflict.

Rather than a noncontroversial assumption about our shared reaction to the case, this further assumption is merely Dworkin's controversial gloss on the reasonable assumption that Society 1 is clearly better on balance. But someone who thinks wealth may conflict with justice has another gloss handy: that the injustice of the transition to Society 2 clearly outweighs the additional, genuine, if smallish, wealth value it creates. For all that Dworkin says, this gloss is just as explanatory.

B. Another Problem

This problem, I think, more than justifies the rejection of Dworkin's critique of wealth and, by implication, its welfare-related interpretation. It is not the only problem with his argument, however. Consider the assumption that the pre-transfer Society 1 is clearly better overall than the post-transfer Society 2. Now as I said, this assumption is in fact reasonable. And perhaps it is also reasonable to believe that most people would accept it. But while the assumption is reasonable, it is not clear that it is capable of supplying the premise that Dworkin really needs for his argument to go through. Proving that justice and welfare do not conflict in some particular case would only prove

Id. at 246. The story is the only evidence cited for the claim that "[i]t is absurd to consider wealth maximization to be a component of value." Id. at 248.

56. Id. at 242.

57. Notice that if Dworkin's entire point in bringing the example is to refute the intrinsic value of wealth, then the problem identified in the text is more fundamental still. I questioned the assumption that (most people would say) Society 2 is better than Society 1 in no intrinsically significant respect. The trouble is that even if the assumption is in fact impeccable, it is still compatible with saying that wealth might have intrinsic value. In particular, it might have intrinsic moral significance in the absence of injustice. This point is rehearsed in the next Part. See infra note 59 and accompanying text.
the truism that such conflicts are not necessary. Dworkin's example is supposed to show that they are not possible, either. To do that, the reaction induced must not depend on contingent features of the example. But there is some reason to believe that the assumption that Society 1 is better overall depends precisely on such features: to believe that it would not survive a legitimate modification of the example.

To see this, notice, first, that the increase in wealth is both very small and indeterminate. Not only is the difference between the respective valuations of the parties a mere $1, but Dworkin also does not exclude the possibility that the parties would voluntarily exchange the book for money if the forced transfer did not take place. In fact, he seems to assume that the book would end up in Amartya's hands anyway. He seems to assume, in other words, that transaction costs are not prohibitive; that they are smaller than $1. Hence, the only reason why the forced transfer guarantees a net increase in social wealth is that transaction costs are not quite zero. For all we know, the net wealth gain associated with the forced transfer is 1/1,000,000 cents!

By contrast, the taking of one's property without his ex ante consent or ex post compensation is a paradigm of rights violation or injustice. Presumably, the forced transfer would still be unjust even if Derek were fully compensated for his book in the amount of $2. Yet, in the example, Derek is not even given partial compensation.

In sum, even if Dworkin's intuition about his own case were right, nothing would follow as to the status of wealth. For there is nothing in his argument to preclude the possibility that some relevantly similar yet different case would induce a contrary intuition.

V. Is Welfare a Value?

Of course, that Dworkin's critique fails to show that wealth is not a component of value or something worth having for its own sake has no tendency to show that it is. In fact, I think Dworkin is entirely correct that wealth is not a distinct, intrinsically valuable goal. As I hope was clear from the discussion thus far (especially in Part II.B), I find the view that wealth is a basic normative factor in its own right rather implausible. But I also tend to think that this has little to do with wealth's relation to justice and much to do with its relation to welfare. And it is the value of welfare that should concern us most.

In this Part, I wish to show how considerations arising from Dworkin's forced-transfer example provide a positive reason to believe that welfare is a distinct, intrinsically valuable goal. In the next Part (VI), I shall argue that similar considerations also provide a positive reason to
believe that welfare is valuable independent of justice in a way that enables the two goals to conflict.

The first order of business is to explain why we must modify Dworkin’s original example in order to make progress on these questions. The reason is simple. Dworkin uses his Derek-Amartya story to show that wealth is not a component of value, and declares that “[i]t shows that a gain in social wealth, considered just in itself, and apart from its costs or other good or bad consequences, is no gain at all.” But how can this be true, when the story actually considers a gain in social wealth together with its justice costs or bad (because unjust) consequences? To put it another way, what is at issue for Dworkin is the claim that, all other things being equal, the more wealth, the better. But on the face of it, not all other things in Dworkin’s original forced-transfer example are equal. In particular, justice supports the choice of Society 1 and opposes the choice of Society 2. That is quite a difference.

A. First Modification and the Pareto Objection

Let us tweak the example to make it engage the question of whether wealth is a distinct, intrinsically valuable goal. To do so, we need to eliminate the difference in justice between the two societies. The simplest way of achieving this is by making the transfer voluntary. Assume that transaction costs are zero and Amartya and Derek do the economically right thing and exchange the book for a price between $2 and $3. To depart as little as possible from the original example, assume that they exchange the book for $2 and Amartya gets to keep the entire $1 surplus. This surplus is a gain in the overall wealth of the parties and is achieved without injustice.

My intuition is that Society 2 is on balance better now. This falls far short of establishing that wealth is a component of value. In partic-

58. DWORKIN, IS WEALTH A VALUE?, supra note 5, at 246 (emphasis added).
59. Notice that this failure-to-engage problem is related to, but different from, the one I identified in Part IV.A ("The Basic Problem"). In a way, it is even more basic. What I took to be the basic problem with Dworkin’s example-based argument is the lack of warrant to assume that (most people would say) Society 2 is in no genuine respect better than Society 1. The failure-to-engage problem, on the other hand, is that even the said unwarranted assumption is compatible with the denial of what Dworkin officially takes the example to show, namely that “a gain in social wealth, considered just in itself . . . is no gain at all.” After all, the fact that a wealth increase has no intrinsic significance when accompanied by injustice leaves open the possibility that such an increase is intrinsically valuable when unaccompanied by injustice. In another way, however, the basic problem identified in Part IV.A is more fundamental. Not only does it tend to undermine Dworkin’s official claim that the example supports the rejection of the basic and intrinsic normative status of wealth; it also tends to undermine his less ambitious purpose of rejecting the possibility of tradeoffs between justice and wealth.
ular, it is very plausible to explain my intuition by saying that the increase in wealth corresponds to an increase in welfare. But if so, my intuition seems to support the view that welfare is a component of value.

I assume that Dworkin would react in something like the following way:

Look. In your modified example, at least one affected party (Amartya) gains something (wealth), and the only other affected party (Derek) doesn't lose anything: Society 2 is Pareto superior to Society 1. Surely, it is this feature of the move—not the extra overall wealth or welfare—that makes it better on balance!

What are we to make of this objection? The safest reply is to eliminate the Pareto factor from the example altogether.

B. Second Modification

Suppose that everything is exactly as in Dworkin's original example, except that neither party has the book. Instead, T (the tyrant in charge) owns the book and is forced to give it to Derek or Amartya. T knows about their respective valuations of the book. Transaction costs are prohibitive (greater than $1). T gives the book to Amartya. If Society 2 is the resulting society and Society 1 is the counterfactual society in which Derek would have had the book, which society is better?

My intuition is that Society 2 is better than Society 1. Yet neither society is Pareto superior to the other. Each choice involves a loser as well as a winner. The elimination of the Pareto factor fails to affect my intuition in the voluntary exchange version of the case. This tends to confirm the hypothesis that what made me prefer Society 2 in the voluntary exchange version is something that corresponds to the wealth improvement, probably a welfare improvement.

Suppose now that T gave the book to Derek. Would we not wish that T had not done so? But this regret cannot be attributed to the failure to make a Pareto improvement, because each of the two alter-

60. Cf. DWORKIN, Why Efficiency?, supra note 5, at 271-72. For a brief endorsement of Dworkin’s Pareto point, see Calabresi, Letter to Dworkin, supra note 33, at 554 n.1.

61. Notice that, unlike in Dworkin’s original version of the example, it matters not whether the question is about all-things-considered or pro tanto betterness: Society 2 is all-things-considered better if and only if it is pro tanto better.

62. To be sure, both societies are Pareto superior to the parent society, but that society is not an option.
natives is Pareto superior to the status quo and neither is Pareto superior to the other.\footnote{Cf. supra note 60 (referencing Dworkin's and Calabresi's positions, according to which the regret is over the failure to effect a Pareto improvement).}

Whereas Dworkin's original example fails to engage the hypothesis that wealth is a distinct, intrinsically valuable goal, modified examples that engage this hypothesis also tend to support it or, what is more likely, its welfare-based corollary. I think this is sufficient to shift the burden of proof to those who think that welfare is not a distinct, intrinsically valuable goal.

VI. TRADEOFFS BETWEEN JUSTICE AND WELFARE

A. Starting Afresh

To test the hypothesis that welfare is a component of value in Dworkin's sense, we had to eliminate the injustice from his example, and thereby eliminate conflicts between justice and welfare. But arguably, the rejection of this hypothesis is not the only option that can give Dworkin what he really needs in the debate, namely the result that tradeoffs between justice and welfare are impossible. The other—and as far as I can tell, only other—position that can do the trick holds that welfare is a distinct, intrinsically valuable goal that nevertheless depends on justice for its value in a way that prevents the two from ever diverging. In this view, the goal of welfare, which is otherwise distinctly and intrinsically valuable, has no value at all unless the goal of justice is satisfied. Equivalently, the satisfaction of justice is a condition on the intrinsic value or normative force of welfare. This is a plausible interpretation of Dworkin's critique. On the one hand, it avoids the rather contentious claim that welfare is not a distinct, intrinsically valuable goal at all. On the other, it preserves Dworkin's primary claim, that conflicts or tradeoffs between justice and welfare are not possible. We shall also see in Part VIII that this view best reflects Dworkin's more recent position.

To test the hypothesis that the value of welfare is conditional upon justice being satisfied, we need to try to describe a conflict between justice and welfare and see if we succeed. To achieve this, we must do two things. We must revert to a version of the example that includes injustice. And we must make sure that the increase in wealth is accompanied by an increase in welfare.\footnote{The word "welfare" here must not be read too literally. It should be taken to mean something like "perceived welfare." On pain of begging the question, we must not assume that a welfare increase in the face of injustice has any normative force, that it is a genuine welfare increase. But we are entitled to assume that a welfare increase is accompanied by...}
Dworkin himself considers the possibility that some people do not share his intuition and would insist that the post-transfer, wealthier society is pro tanto better, even if not on balance. He then raises the eminently plausible hypothesis that these people must be making the further assumption that the transfer of the book “will increase overall utility as well as wealth.” He concludes that he “must thus make [his] example more specific.” At this point, you might expect Dworkin to make the example more specific so as to test the view that utility or welfare is valuable intrinsically and independently of justice. After all, this is probably the most plausible interpretation of the value theory at the heart of law and economics. You might expect him, in other words, to tweak the example with a view to describe a conflict between justice and welfare, and then explain why he thinks the conflict is merely apparent.

But this is not how Dworkin proceeds. Having noted that “Posner, at least, is now explicit that wealth is conceptually independent of utility,” he modifies the example so as to refute the particular, and particularly contentious, version of normative economic analysis that takes wealth to be valuable independently of welfare:

Derek is poor and sick and miserable, and the book is one of his few comforts. He is willing to sell it for $2 only because he needs medicine. Amartya is rich and content. He is willing to spend $3 for the book, which is a very small part of his wealth, on the odd chance that he might someday read it, although he knows that he probably will not. If the tyrant makes the transfer with no compensation, total utility will sharply fall. But wealth, as specifically defined, will improve.

I ask whether if the tyrant acts, the situation will be in any way an improvement. I believe it will not.

This seems quite right: the wealth improvement under these circumstances will not amount to a genuine value improvement. But what exactly is this meant to show? On the one hand, it cannot show that wealth depends on, or derives its value from, justice. Surely, we would still think that the post-transfer society is in no genuine way better even apart from the injustice, say, if the transfer were voluntary. On the other hand, if the modified example were designed to show that

an increase in what intuitively appears to be personal welfare or some constitutive component thereof.

65. Dworkin, Is Wealth a Value?, supra note 5, at 244.
66. Id.
67. Id.
68. Id.
69. Id. at 244-45.
wealth depends on, or derives its value from, welfare, then it is not clear what role the injustice of the forced transfer is supposed to play in the argument.

Needless to say, Dworkin's modification of the example fails to engage any claim about the relation between justice and welfare. Ex hypothesi, the example involves the opposite of welfare improvement. Rather than pitting justice and welfare against each other, the example makes them pull in the exact same direction. In failing to engage the most plausible candidate for the normative premise behind normative economic analysis, Dworkin fails to give this popular approach a run for its money.

B. Third Modification

To engage this plausible theory, we have to modify the story in the opposite direction. Far from driving a wedge between wealth and welfare, we need to build a bridge between the two. Notice that since Dworkin's thesis is about what is possible, there is surely nothing sacred about his numbers. Suppose then that while Derek values the book at $2 as before, Amartya values it at $300. Moreover, suppose that, unlike in Dworkin's modified example, Derek is the one who is rich and content, and has all the medicine he needs. He is only minimally interested in the book. Amartya, on the other hand, is strongly interested in the book, for personal or idiosyncratic reasons having to do with its content, special history, and appearance. It is virtually certain that he would read it repeatedly and use it as a source of inspiration for a play he is currently writing. To keep things simple, assume that transaction costs are prohibitive. Now ask Dworkin's original question: Is the post-transfer Society 2, which appears to satisfy better the goal of welfare, in any way better than the pre-transfer Society 1, which presumably better satisfies the goal of justice?  

70. How could transaction costs rise above $298? I simply stipulate that they do, to force the choice between (1) a society with clearly greater welfare plus an injustice, and (2) a society with clearly less welfare minus that injustice. Either we are entitled to assume that transaction costs are higher than zero or we are not. But if we are, then whether they are less than $1 (as in Dworkin's example) or more than $1 is a technical question. And if they are more than $1, whether they are only a little or much more is also technical.

71. I think Posner is exactly right to note that "[t]he relationship between wealth and utility is obscured by the particular numbers which Dworkin uses in his example." Posner, The Value of Wealth, supra note 23, at 245. Dworkin's following response is strictly applicable to my own treatment of his example:

[Posner] asks us to assume, directly contrary to the assumption I made, that overall utility would be improved by stealing the book from Derek and giving it to Amartya. But my purpose was to show that wealth maximization could only be thought useful if it happens to improve utility or produces some other gain it
My own intuition is that yes, Society 2 is in some real, ethically relevant sense better. To my thinking, if Society 1 is still better all things considered, it is so in spite of the fact that Society 2 is better in some genuine, ethically significant way; that is to say with respect to welfare. My own reaction to the example, in other words, is conflictual. Opting for Society 1 would be a tradeoff in favor of justice; opting for Society 2 would be a tradeoff in favor of welfare. Neither option is a win-win situation.

But if tradeoffs between justice and welfare are not even “in question” or “conceptually on the cards,” then my modified example involves no genuine conflict of values and gives no occasion for a tradeoff. If we opt for Society 1, we do not simply make the right decision on balance; we manage to do so without sacrificing anything of value. If we opt for Society 2 instead, we do not simply make the wrong decision; we do not even gain anything of value. My conflictual intuition must be condemned as irrational, confused, or arbitrary.

To the extent that you share my intuition, we have a reason to believe that justice and welfare conflict and to reject Dworkin’s challenge. Our intuitions may fail us, and we should always be open to the possibility of an argument that exposes them as irrational or otherwise mistaken. But Dworkin voluntarily submits to the jurisdiction of our intuitions. In fact, it is not clear that his example-based argument appeals to anything but intuition. Either we sufficiently trust our intuitions to regard them as reasons for belief or we do not. If we do not, Dworkin’s example-based argument against the tradeoffs view does not get off the ground. But if we do, then if our intuition is conflicted, we should regard it as a reason for subscribing to the tradeoff view.

VII. THE ANALOGY-BASED ARGUMENT

The argument of Is Wealth a Value? sets out to refute normative economic analysis in general. But, in fact, it is “largely, though not entirely” concerned with the arguments of Posner. This goes some way to explain Dworkin’s failure to confront explicitly and clearly the normative status of welfare and its relation to justice. In the compan-

makes sense to value for its own sake. So Posner has changed the subject as well as the example.

Dworkin, A Reply, supra note 20, at 295. My point is precisely that we should change the example (and perhaps also the subject, at least if it is the normative status of wealth). Otherwise, Dworkin’s critique would be too weak to defeat a plausible version of normative law and economics.

72. DWORKIN, Is Wealth a Value?, supra note 5, at 237.
tion article, *Why Efficiency?*, Dworkin is more directly concerned with Calabresi's "modest version" of normative economic analysis. Since there is no good reason to think that this or any other modest version of normative law and economics regards wealth as an ultimate, intrinsically valuable goal of the law, perhaps this is the place to address the value of welfare directly.

The problem is that the companion article continues not to engage directly the most plausible interpretation of the value theory at work in Calabresian law and economics: indeed, in any plausible normative law and economics. It massively plays down the difference between that interpretation and the "immodest" version attributed to Posner. Here, as in the original article, Dworkin writes as if the sole issue on which the two versions of law and economics can be said to diverge is whether wealth is the only distinct and independently valuable goal that is appropriate for the law to pursue. This assumes that both versions share the theory that wealth is a "component of value" and is valuable for its own sake and apart from its contribution to welfare. As a result, the official target of the companion article continues to be this rather contentious claim, instead of the plausible value theory that welfare is intrinsically and independently valuable.

This, however, should not matter. As before, if the argument fails to show that wealth depends for its value on, and so cannot conflict with, justice, then it obviously fails to show that welfare depends for its value on, and cannot conflict with, justice. Somewhat more surprisingly, the converse also seems to hold true of Dworkin's argument. It seems to me to be a feature of his argument that, if it fails as an argument against the intrinsic value of welfare and its independence of justice, then it must also fail as an argument against the intrinsic value of wealth and its independence of justice. Nothing in the argument, in other words, seems to turn on whether the goal that can or cannot possibly conflict with justice is wealth or welfare. Given our primary concern, we might as well interpret it in terms of welfare.

**A. Recipe and Compromise**

Dworkin's argumentative strategy in the companion article is to re-describe the competing views in the debate—Calabresi's view that welfare is valuable independently from justice (in the conflict-enabling sense), and Dworkin's own view that it is not—as two alternative, mutually exclusive ways of regarding the "right mix" of the two puta-

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73. DWORKIN, *Why Efficiency?*, supra note 5, at 267-75.
ative values: a "compromise" and a "recipe." The nerve of the argument, as I understand it, is that once the two ways of regarding the right mix are explicitly spelled out, we would converge on the intuition that the right mix between welfare and justice is a recipe. Yet since there is no material difference between the recipe view and the claim that welfare cannot conflict with justice, this convergence tells against Calabresi's tradeoffs view.

Dworkin's argument therefore turns crucially on his distinction between compromise and recipe. He offers an interesting test for distinguishing between the two, which he describes by contrasting two examples. I italicize the parts from which the test can be gleaned:

[First, the field example:] Someone who likes both parkland and crops, for example, must think about the best mix of park and cultivated fields on his property. He wants as much as he can have of each, but since the total property is limited these desires conflict, so he must sacrifice some of what he wants to have more of something else he wants. If he has chosen a particular mix as the "right" mix, and subsequently discovers a way to produce more crops from the land he has cultivated, he will regard this as an obvious and unqualified improvement.

[Next, the cake example:] This "compromise" sense of a trade-off or right mix must be distinguished from the "recipe" sense, in which some mix of ingredients is the right mix only because it will produce the best final product. Someone making a cake may be concerned about the right mix of flour and eggs, not because he independently values each and wants as much as he can have of both, but because a particular mix is better than any other mix for making cakes. Suppose the right mix is two eggs to a cup of flour. A baker who is told that, in fact, he can add three eggs without thereby decreasing the flour he may add will not think that this suggestion points the way to an improvement in this situation, but only the way to disaster.

I think Dworkin has in mind the following test. We are to suppose, first, that a decisionmaker has chosen a particular mix of elements (or considerations) as the "right" one, and second, that he subsequently discovers a way to have (or satisfy) more of one of them without having less of (or frustrating) the other(s). We then ask: Will she regard this as an obvious and unqualified improvement? If yes, we have identified a compromise (as in the field example); otherwise, we have identified

74. See id. at 267-69.
75. Id. at 267-68 (emphasis added).
a recipe (as in the cake example). Dworkin seems to think that the application of this test to the right mix between justice and welfare should yield a clear recipe verdict. Mixing justice with welfare is like mixing eggs and flour and unlike mixing park and cultivated land. If we agree, perhaps we implicitly commit ourselves to the view that welfare is not a distinct, intrinsically normative value, and in any event to the view that its value depends on justice in a way that renders conflicts impossible.

The “obvious and unqualified improvement” test is unsound. It crucially equivocates on “the right mix.” Consider: If the chosen mix really is the right one, then the decisionmaker cannot possibly discover a way of having more of one element without having less of the other. (If he could, then the newly discovered mix would surely be better than the originally chosen mix.) On this reading, the field example is incomprehensible. But if the chosen mix need only be apparently right—if it is enough that the decisionmaker or anyone else believed or justifiably believed it to be right—then it is always possible to answer Dworkin’s question in the affirmative, including in what Dworkin treats as recipe cases. On this reading, the cake example may well yield a compromise verdict, after all. To see this, suppose that despite the baker’s initial, justified or unjustified, belief that the right recipe calls for two eggs for every cup of flour, it really calls for three. On discovering his mistake, a good baker will regard the addition of a third egg as an obvious and unqualified improvement. By applying one test to the first example and another test to the second, Dworkin is trying to have his cake and eat it, too.

B. The Cake Analogy

I wish, however, to stay a little with Dworkin’s cake analogy. Let us suppose that the correct recipe is two eggs for every cup of flour. How should we interpret the analogy? What exactly is analogous to what here? It is abundantly clear that welfare in real life is analogous to the eggs in the example. After all, the obvious fact that simply having more eggs cannot improve the cake—that foregoing a third egg involves no sacrifice at all—is supposed to make us realize that simply having more welfare cannot improve overall value in society. But then, what is justice analogous to?

I see exactly two possibilities. On a symmetrical interpretation, justice is analogous to the flour (as welfare is to the eggs). But the symmetrical nature of this interpretation, which makes it natural, also

76. Id. at 271-73.
makes it self-defeating. Surely, eggs and flour are on strictly equal footing as cake ingredients. If the analogy has any tendency to show that eggs (welfare) are not a component of value worth having for its own sake (or at least that they are not valuable independently from the flour/justice), then we can easily turn the example around to show that flour (justice) is not a component of value worth having for its own sake (or at least that it is not valuable independently from the eggs/welfare). Surely, adding a second cup of flour makes no more culinary sense than adding a third egg.

This, then, cannot be Dworkin’s intended interpretation of the analogy. On the only other natural interpretation, justice in real life is analogous to the correctly baked cake in the example. Indeed, it seems to me that Dworkin’s discussion tends to equate the right decision, all things considered, with what is just. This tendency finds expression in his assertion that, if what we care about is “the morally best society, all things considered,” then the “very idea of a trade-off between justice and wealth now becomes mysterious. If the individual is to choose the morally best society, why should not its justice alone matter?” However, the asymmetrical interpretation of the analogy threatens to vitiate the debate (or beg the question). Dworkin appears to be claiming that it makes no good sense ever to consider trading off justice for welfare. Arguably, Calabresi would wish to make the reverse claim. (Hence the controversy.) But if justice is defined as what is, all things considered, right, then of course it makes little sense to talk about genuine conflicts between justice and welfare, or any other putative value for that matter. Calabresi would not wish to deny that. And we hardly need any elaborate argument to deliver this result.

C. Calabresi’s Response

Dworkin’s challenge had prompted Calabresi to restate his position on the goals of accident law. The response inherits the key am-

77. DWORKIN, Is Wealth a Value?, supra note 5, at 248.
78. Compare Calabresi, Letter to Dworkin, supra note 33, at 553 n.1 (the disagreement is “largely verbal”), with Dworkin, Why Efficiency?, supra note 5, at 572-73 (arguing in a Postscript included in the original published version of the article, but not included in the reprinted version, that the disagreement is genuine). It is always better to presume a disagreement genuine, and this is what I have been doing throughout. Alas, this presumption would be rebutted by the stipulation that “justice” denotes what is all-things-considered best or what is right on balance, morally speaking.
biguities of Dworkin's critique—in particular the equivocation
between wealth or efficiency and welfare—and, more to the point,
between the permissibility of tradeoffs and their possibility. The point
of the response is clearly reconciliatory. It is an attempt to show that
Calabresi does not really disagree with the gist of Dworkin's critique.
"It seems to me," he says at one point, "that the differences between
him and me are largely verbal." And at another: "I do not, and
never have, held that one can trade-off efficiency and justice."

According to Calabresi's restatement of his position, welfare is no
longer a distinct, intrinsically valuable goal that the law should pursue.
Instead, justice is now crowned as the only such goal. The pursuit of
welfare may only be valuable instrumentally; that is, insofar as it con-
tributes to the attainment of justice.

I am not sure that this represents Calabresi's considered
view. It seems to me that he is misled here by the ambiguity of the tradeoffs
issue. Prompted by an impulse to reassert his commitment to Justice
Before Welfare, which implies that tradeoffs in favor of welfare and
against justice are impermissible, he almost relinquishes his commit-
ment to Both Justice and Welfare, which implies that such tradeoffs
are possible. But relinquishing this commitment would amount to a
gratuitous concession, for accepting the possibility of tradeoffs is com-
patible with rejecting their permissibility.

But, of course, if my critical assessment of Dworkin's critique of
normative law and economics is cogent at all, then Calabresi's conces-
sive comments—whether they merely clarify or also modify the position of Costs—are not just gratuitous. They threaten to trade a rather
plausible thesis for a less plausible one, and for no good reason. I
therefore suggest that we revert to my reading of Calabresi's original
position in Costs, under which he holds Both Justice and Welfare.

80. Calabresi, Letter to Dworkin, supra note 33, at 553 n.1.
81. Id. at 557.
82. Id. at 558-61. For example: "if lawyer-economists do not make the mistake of
claiming too much for what they are doing, and if they are willing to work at defining and
analyzing good instruments leading toward the just society, philosophers ought not be
troubled;" the "mixture of efficiency and distribution" is "instrumental toward justice." Id.
at 561.
83. How do we reconcile Calabresi's claim that he has never "held that one can trade
off efficiency and justice," with his claim that "it is possible to speak of trade-offs between
efficiency-wealth maximization and wealth distribution," for example? Id. at 557, 558.
Surely, since wealth distribution (either the action or the product) is not a goal or value at
all, the expression must refer to justice in the distribution of wealth?
VII. JUSTICE AS A CONDITION

We have already examined, and rejected, the views that (1) welfare is not a component of value that is a distinct, intrinsically valuable goal in itself, and (2) the somewhat weaker view that welfare is in fact such a distinct and genuine goal, but its value depends on justice in such a way that the two goals cannot conflict. As it turns out, whether or not Dworkin ever held the first of these two views, he certainly no longer holds it. However, he apparently still holds on to the second view. What is more, he has fresh arguments for it. Like the old arguments, they conveniently revolve around a single example. But they also rely on somewhat more abstract theoretical considerations.

In his Lindley Lecture, *Justice and the Good Life*, Dworkin explicitly defines the relationship between justice and welfare ("well-being") by saying that the former is a condition of the latter. Dworkin's critical target is the "standard assumption of political philosophy... that redistributive programs impose losses or sacrifices on the part of those who must pay higher taxes," or the assumption "that measures aimed at greater justice involve genuine sacrifices for those who lose financially." Now, Dworkin introduces a complication by distinguishing between a strong version of this claim, in which well-being carries no weight unless the demands of social justice are satisfied, and a weaker version, in which the normative contribution of well-being is diminished in an unjust community. And he commits himself only to this latter, weaker thesis. I shall largely ignore this complication and concentrate closely on the strong thesis, deferring my reaction to the weaker thesis to the end of this Part (VII.E).

The condition thesis says that welfare carries absolutely no normative significance unless justice is satisfied. Dworkin emphasizes that this thesis is actually compatible with "the prosperity hypothesis: that people are better off in a just society in which they have more than in another one, also just, in which they have less." All other things being equal (including justice), more welfare is better than less. So welfare must have intrinsic normative significance that is not derived from the significance of justice. Yet the very force of welfare considerations depends on whether justice is satisfied. Welfare considerations cannot favor what justice disfavors.

84. DWORKIN, JUSTICE AND THE GOOD LIFE, supra note 9, at 6.
85. Id. at 1.
86. Id. at 9.
87. Id. at 15. Interestingly, Dworkin seems to extend this claim to wealth! Does he wish to repudiate his plausible claim that more wealth is not in itself better, not even pro tanto?
The condition thesis can be seen as an attempt to save Dworkin's original critique without committing to the contentious view that welfare is either not a distinct basic value or that it derives all its value from justice. It is subtly but crucially different from Justice Before Welfare, under which trading justice for welfare is never permitted. First, Justice Before Welfare does not imply that justice is ever relevant to anyone's personal welfare. It simply says that justice always outweighs or takes normative priority over welfare. Second, Justice Before Welfare does not preclude, but rather presupposes, the possibility of tradeoffs between justice and welfare. Welfare considerations do not disappear from the normative scene just as they would otherwise conflict with justice considerations; they continue to exert their normative pressure, only to be defeated in conflict. Under the condition thesis, by contrast, welfare considerations carry no normative force whatsoever against considerations of justice in the first place. It is not that justice always defeats welfare in a conflict; it is rather as if once a conflict between justice and welfare threatens, welfare loses any normative force it would otherwise have, so there is no longer anything there for justice to conflict with and defeat.

Dworkin does not quite argue for the condition view. He rather puts forward a picture he calls "the parameter thesis," which "assumes that someone's well-being must be judged in terms of how adequately that person has responded to the challenges and constraints of his culture and circumstance, and insists that these constraints include parameters of fairness and justice." Well-being here is meant as a "critical" rather than a "volitional" category. One's critical well-being is improved not by having or achieving what he actually wants or cares about, but rather "by his having or achieving what he should want, that is, the achievements or experiences that it would make his life a worse one not to want." The parameter thesis says that the demands of justice constrain what experiences and achievements I should want.

A. The New Organizing Example

In Dworkin's new organizing example, someone is asked to pay taxes that are higher than what he has previously paid and what others are asked to pay. The progressive tax reform will bring about more social justice in the form of a more equal distribution of resources. The loss in wealth means that the taxpayer will have to forego all sorts

88. Id. at 9.
89. Id.
90. It is worth pointing out that the focus of the example is the (distributive) justice of the society, not the justice of the agent. The agent himself may or may not have a say as to
of goods he wants to have: "comfortable, attractive homes, fast, safe automobiles, and extended and interesting vacations, for example." Yet the taxpayer in fact wants to see the progressive reform passed, despite the expected diminution in his personal wealth and the consequential loss of the said goods. The only question is whether the progressive reform involves any genuine loss or sacrifice for the taxpayer, in terms of how well his life goes.

I should immediately note that Dworkin's choice of example is odd. Suppose for a moment that Dworkin is entirely right about his interpretation of the example, and the willing taxpayer who wants to see the program adopted will in fact suffer no loss to his overall well-being as a result of the program. For all we know, this is because his desire to see the program adopted shows that justice is more important to his personal well-being than whatever goods he would have to forego. But what about those who do not wish to see the program adopted? Suppose that I am in the position of the taxpayer in Dworkin's example. To beef up the story, let us assume that, in addition to the comfortable home, safe automobile, and extended and interesting vacation that I would have to forego, I would also be forced to forego a trip abroad to visit my family, to make do with moderately good rather than excellent health and child care, and to stop my modest charitable contribution to famine relief in Africa. I understand full well what social justice requires, namely that I would live in a more just society if the tax reform were adopted. And I do care about the good of social justice. Still, I care far more about losing all these other goods than about living in a somewhat more just society.

This, I think, and not the case of the willing taxpayer, is the true test case for the claim that progressive taxation may involve a genuine sacrifice in terms of personal well-being. Showing that taxpayers who are in favor of the socially just program make no genuine sacrifice would only contradict the claim that higher taxes necessarily impose a welfare loss on each and every taxpayer—a claim that, as I shall explain in a moment, is both implausible and ill-described as a standard assumption. If justice is a general condition of well-being, then it is a condition of my well-being whether I support the tax program or not. So if the condition thesis is right, I am expected to suffer no loss of well-being as a result of the program, even though I do not support it in any way—in fact, even if it infuriates me. But before we consider my

whether the program is adopted. He therefore may or may not be in a position to act in a more or less just way.

91. Dworkin, Justice and the Good Life, supra note 9, at 6.
modified version of Dworkin's example, let us be clear about his critical target.

B. The Standard Assumption

Dworkin's critical target is the "standard assumption of political philosophy," or "the assumption at the heart of the modern debate about justice," that "redistributive programs impose losses or sacrifices on the part of those who must pay higher taxes," "that measures aimed at greater justice involve genuine sacrifices for those who lose financially," and "that people who pay more taxes in the interests of justice suffer or sacrifice in their own lives." But this is not quite accurate. There is no standard assumption in political philosophy that every redistributive tax program imposes genuine losses or sacrifices on every taxpayer. Rather, the standard assumption is that redistributive taxation may well impose such genuine losses or sacrifices and often enough does so. This is a distinction with a difference: under the second formulation, the standard assumption is very plausible; under the first, it is not plausible at all.

It is surely a mistake to think that, just because progressive taxation detracts from my wealth, it must also detract from my well-being. Thus, for example, so long as I am sufficiently rich and the tax increase is sufficiently small, having to pay more is likely to have no discernible negative effect on my welfare (it may even have a positive effect). Asking people to pay extra money may or may not amount to asking them to make a sacrifice in terms of their well-being, depending on, among various other things, how much money they already have and how much you ask them to pay. By claiming that the progressive tax program requires me to make a genuine sacrifice, I am not committing myself to the falsity that paying higher taxes must compromise a taxpayer’s welfare, only to the highly intuitive claim that it may compromise a taxpayer’s welfare and does so in my own case.

C. The Unwilling Taxpayer

To bring this intuitive claim out, let me beef up our modified example of the unwilling taxpayer still further. Suppose I am wealthy enough to be in the top tax bracket and that I am therefore required to pay the highest tax rate. I am already paying a large percentage of my salary to the treasury (say, thirty percent), but the redistributive reform increases this significantly (say, by ten percent). Still, I am

92. Id. at 1, 5.
right at the bottom of my tax bracket. While wealthier than most people, I am far from being rich. The rich at the top of my tax bracket would be able to buy the goods that make up their standard of living anyway. But the tax increase would prevent me from buying various goods that make up my present standard of living. (An extra trip abroad per year to visit my parents with the kids, for example.) Doesn't the diminution in my standard of living constitute a genuine loss in my overall well-being?

It is hard to see how not. Now it is clear enough that the program reduces my overall "volitional" well-being: after all, I care less about justice than about the other goods on the line. But what about my "critical" well-being? By Dworkin's definition, my critical well-being is improved by my "having or achieving what [I] should want, that is, the achievements or experiences that it would make [my] life a worse one not to want."93 Now this formula does not seem to give any weight at all to what I actually care about or am disposed to care about. Dworkin's contrast seems to force us to choose between the volitional and the critical notions of well-being. Yet neither notion is particularly appealing. The purely volitional account is vulnerable to the familiar objection that it does not allow for the possibility of uninformed, irrational, or otherwise defective preferences. It does not allow us to criticize our preferences: hence the need for a critical account. But a purely critical account is vulnerable to an equally familiar and powerful objection. Surely there must be a limit to the preferences or dispositions that we can plausibly discard as irrelevant to how well a person's life goes? Can we say that something is good for me even though I would absolutely hate to have it? Can't the fact that I actually care about or am disposed to care about something very much make a real difference as to whether, or how much, it is good for me? I am reluctant to believe that Dworkin would wish to deny this much. In describing his organizing example, he takes care to note that the agent actually wants to see justice done. In fact, he takes pains to mention that he has "spent [his] life" pursuing social justice.94 Presumably, he would agree that this fact has at least some bearing on how well the agent's life goes if the just program is adopted—quite apart from what the agent should want. If this is right, then the very fact that I care or am disposed to care more about the foregone goods than about social justice may have some tendency to show that the former are more important to my personal well-being than the latter.

93. Id. at 9.
94. Id. at 5.
Be that as it may, I claim that it is entirely reasonable to think that my overall critical well-being, under Dworkin's own definition, is impaired by the program. I see no special reason to think that I shouldn't want the goods I actually want as much as I do. Nor do I see any particular reason to think that my life would go better had I wanted social justice more. In other words, there seems to be no special reason to think that social justice is a condition of my critical well-being.

\[D. \text{ The Willing Taxpayer}\]

I have claimed that the case in which the taxpayer who pays higher taxes cares less about social justice than about the foregone goods that make up her standard of living seems to present a serious difficulty, if not a counterexample, to the condition thesis. The thesis might seem to be on more solid ground in the case of the willing taxpayer, who would rather contribute his share to redistributive social justice than retain the goods such contribution would force him to forego. At least if we give independent weight to how much the agent cares about the goods in question, we might be inclined to say that the pursuit of justice involves no genuine loss or sacrifice on the part of such a willing taxpayer. After all, he bears the “loss” willingly. If so, perhaps this is no loss at all!

But in fact, this thought is based on a basic confusion. Once the confusion is removed, it will transpire that the case for the condition thesis is not much stronger with respect to the willing taxpayer than with respect to the unwilling one.

Put generally and vaguely, the question at issue is whether the decrease in my standard of living may amount to a loss in my welfare or well-being, even when it contributes to social justice. But this way of putting the question is ambiguous. We ought to distinguish clearly between one's overall welfare and components of one's welfare. In saying that the tax increase will “compromise my welfare,” I may be saying that it will diminish my welfare on balance. This is a relatively strong claim. But I may also wish to make the weaker point, namely that the tax increase will diminish my well-being in some significant way: while my overall well-being may be improved, a genuine aspect of my well-being will suffer. Dworkin is not always clear on whether he is after the first or the second claim. We have already seen in our discussion of the unwilling taxpayer that the first and stronger claim may well be true. But it is important to see that this stronger claim is not quite necessary for rejecting Dworkin's condition thesis or accepting the standard assumption. The second and weaker claim is in fact entirely sufficient for this purpose.
To vindicate the language of sacrifice, all we really need is the claim that the decrease in my standard of living represents a decrease in some genuine aspect of my welfare. It is in principle open to me to concede that, since I place so much importance on social justice, my life on the whole would go better if the tax reform were adopted, and still insist that its adoption would involve a genuine and significant loss or sacrifice, because the goods that I would have to forego are constitutive elements of my well-being. Health care, child care, family visits, enjoyable vacations, and modest charitable contributions to famine relief are all things for which my life is good or valuable.

They are not, however, the only components of my well-being. In particular, justice may be another. Under certain circumstances, compromising some components of well-being for the sake of securing others may result in an overall increase in well-being. Like all genuine compromises, however, it involves a sacrifice of something of value. In this way social justice may involve a genuine sacrifice on my part even when it results in an overall increase in my welfare.

E. The Weak Condition Thesis

I have been attributing to Dworkin a rather simple version of the condition thesis, according to which one's well-being cannot really diminish as long as social justice is done. After all, this would enable him to reject the standard assumption about redistributive taxation. It would make good sense of his rejection of the view that social justice may be a component or aspect of well-being, in favor of the view that it is a condition or constraint on well-being.95 Still, when he introduces the notion of justice as a condition, he only says that justice is a condition of well-being "in some way or to some degree."96 But what is the difference between something being a component of well-being and its being a condition of well-being to some extent?

According to Dworkin, "justice is not any kind of component of well-being, but in some way a background condition of the various experiences or achievements that are part of well-being having the full value that they might."97 He distinguishes a strong ("platonic") version of this view, "that other components of well-being, like large homes, interesting work and travel, are worthless unless the community in which these are enjoyed is a fully just one," but settles on the "more moderate form of the claim; that the force of these goods, as contribu-

95. *Id.* at 5-9.
96. *Id.* at 6.
97. *Id.* at 9 (emphasis added).
tions to an overall good life, is diminished in an unjust community so that they do not have the value they would have in just conditions."98

I hope it is clear why I focused my discussion on a stronger version of the condition thesis. The weak version is just too weak to serve Dworkin’s purpose. The claim that my well-being in an unjust (or less just) society would be even greater in a just (or more just) society is indistinguishable from the claim that, all other things being equal, my life goes better in a more just society. This is not a trivial claim to make (I personally almost tend to think it is false). But it is perfectly compatible with the standard assumption. That my life would go even better if I could retain my standard of living goods and live in a more just society is surely compatible with the claim that my life goes worse because I actually do have to forego these goods! In terms of the component view, injustice may come at a cost to one component of my well-being, but justice may come at an even greater price to other such components.

IX. Justice Before Welfare?

Remember that, alongside Both Justice and Welfare, Calabresi holds Justice Before Welfare. I remarked at the outset of this Article that there is tension between these two admittedly consistent theses: If justice and welfare are independently valuable goals that may conflict, in which case any way we turn involves a tradeoff, it is only natural to assume that tradeoffs in either direction are at least sometimes permissible. I wish to conclude this Article by arguing that this is in fact so. By arguing that the trading off of justice for the sake of welfare may be morally permissible, of course, I will also be arguing that tradeoffs between justice and welfare are possible. Paradoxically, the rejection of Calabresi’s Justice Before Welfare provides a decisive reason to reject Dworkin’s critique of tradeoffs.

A. Interpretation

Considering the view that “justice is in some sense a goal concurrent with accident cost reduction,” Calabresi remarks that it “fail[s] to ring true” because it suggests “that a ‘rather unjust’ system may be worthwhile because it diminishes accident costs effectively.”99 He then asserts that, strictly speaking, justice “is not a goal but rather a

98. Id. (emphasis added).
constraint that can impose a veto on systems or on the use of particular devices or structures within a given system.\(^{100}\)

Theoretically, the word "can" in this last sentence would seem to leave open the possibility that justice does not impose a veto. To develop the metaphor: perhaps justice has a veto power that it may or may not exercise, depending on the circumstances. But Calabresi tells us nothing about the circumstances under which this veto power should be exercised. For the most part, he simply regards the veto as automatic. Thus, fairness is "a final test which any system of accident law must pass"; "Justice must ultimately have its due."\(^{101}\) In sum, Calabresi seems to hold that the goal of justice is an absolute constraint on the goal of welfare: that the first goal takes simple lexical priority over the second. Of course, we are not only permitted but also required to trade off welfare for the sake of justice. But while we could trade off justice for welfare if we wanted to, we are never morally permitted to do so.

Notice that it is not so easy to understand the significance of the distinction between Dworkin's (strong) condition thesis and Calabresi's Justice Before Welfare. For one thing, they seem to carry the exact same practical implications. Assuming, as Calabresi and Dworkin seem to do, that justice and welfare, between them, exhaust the normative domain—that no other goal or value is a genuine normative factor—both appear to hold that considerations of welfare may only affect the choice between equally just options. For another, the difference between the claim that justice wins all its conflicts with welfare in virtue of its constraining capacity (Calabresi) and the claim that justice precludes all such conflicts in virtue of its conditioning capacity (Dworkin) requires some explanation. Luckily, there is no pressing need to explain the distinction, because the first thesis is just as implausible as the second. Indeed, the same considerations that justified us in rejecting the claim that tradeoffs between justice and welfare are impossible will also justify us in rejecting the claim that tradeoffs in favor of welfare are never permissible. For welfare may well defeat justice.

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100. Id.
101. Id. at 24 n.1, 26 (emphases added); see also id. at 28 n.6 ("[W]e would not tolerate trade-offs between justice and economic efficiency."). In line with the rest of his response to Dworkin, Calabresi declares: "I do not, and never have held that one can trade off efficiency and justice." Calabresi, Letter to Dworkin, supra note 33, at 557.
Indeed, I do not think we need much more than the Derek and Amartya example to prove the point. All we need is the version of the story we discussed in Part VI.B ("Third Modification"). There we changed the facts of the story to ensure a positive correlation between the parties' wealth and their welfare, and reported a conflictual intuition to the effect that the post-transfer, unjust society (Society 2) is nevertheless better in some respect, namely personal welfare.

But it strikes me as a small step from this to the suggestion that, as long as we keep modifying the example in the right direction, we are sure to reach a point where we no longer think Society 1 is all-things-considered better, and then another point where we think Society 2 is all-things-considered better. And we reach these normative turning points despite the realization that Society 1 is more just than Society 2. To bring this out, I would like to introduce one last modification of the example. Again contrary to Dworkin's stipulation, assume that, as T (the tyrant) gives Amartya Derek's book, he also takes $2 from Amartya and gives it to Derek. T's act is still unjust—it is still a forced transfer—but it is surely less unjust than its uncompensated counterpart. At this point, you may still think that T's act is all-things-considered impermissible. But now keep increasing Amartya's expected wealth gain: $3,000, $30,000, $300,000, $3,000,000 . . . , remembering all the while that these dry numbers faithfully reflect a gain in the availability to Amartya of such goods as safety, health, education—indeed, anything that might seem relevant to how well his life goes but cannot be plausibly described as justice. To make this credible, of course, you might have to replace the book with a more valuable good or set of goods, perhaps a rare medicine or a Stradivarius. But surely the book, like the exact nature of the injustice or its beneficial effects, is just a detail. Other possible details would do just as well. All we need is one possible case in which justice defeats welfare. And I see no reason to think that my modified scenario with its large numbers is any less possible than Dworkin's original scenario with its small numbers.

C. Calabresi's Fungibility Theme

Justice Before Welfare also stands in tension with, and is less plausible than, a recurring theme in Calabresi's work. The theme, to put it bluntly, is the in-principle fungibility of everything (or pricelessness of nothing). Calabresi rejects as a myth the view "that our society wants to avoid accidents at all costs," or that it is "committed to pre-
serving life at any cost." These might sound like empirical observations about what the prevalent moral beliefs in contemporary society happen to be, but I prefer to assume that the point goes beyond such observations. The point, I think, is not simply that we often give a green light to the trading of apparently priceless goods for the sake of fungible ones. The interesting point is surely that there is nothing necessarily wrong with such tradeoffs either.

Now as we have seen, costs for Calabresi are primarily welfare costs. To say that most every good is fungible in principle is to say that some welfare cost may be sufficiently high to justify its sacrifice. It is to say that, in the last analysis, it may be morally permissible to trade the good in question for some welfare benefit, even if only for an astronomically large one. But if most everything, including a human life, is fungible in principle, it would surely be strange to discover that the good of justice is priceless in principle. Consider the right of the innocent not to be intentionally killed. Violating this right is unjust if anything is. If life is fungible in principle, then tragic as it always is, the intentional taking of an innocent life to secure (prevent) a welfare benefit (loss) may, in the last analysis, be permissible. Admittedly, the welfare benefit required to render such injustice permissible is astronomical. But an astronomical price is a price all the same.

The in-principle fungibility of everything clearly threatens to contradict Justice Before Welfare. Perhaps it is possible to come up with a doctrine of justice as a non-absolute constraint. But first, merely pointing out the possibility of such an account does not advance matters. Second, and more important, the notion of a non-absolute constraint suits me just fine. It implies that at least some tradeoffs between justice and welfare in favor of the latter are not only possible, but also permissible. And this is already more than I need to defend Both Justice and Welfare and reject Dworkin’s critique.

102. The Costs of Accidents, supra note 1, at 17-18.
104. Some might resist this claim by saying that certain acts are always impermissible, although they may turn out to be justified. In the language of this Article, this is the claim that certain acts are always unjust, although they may turn out to be, all things considered, permissible. I have no principled objection to interpreting my claims about permisibility as claims about justifiability.
D. Beyond Rights

The foregoing discussion suggests that justice, understood as rights that constrain welfare enhancement, can only be a non-absolute constraint. This means that tradeoffs that favor welfare over justice may be permissible. This result is even more easily seen if we take "justice" to refer to considerations of distributive justice that do not necessarily amount to rights. As it happens, I believe that the University of Michigan has a moral reason to institute an affirmative action plan in law school admission. This is a reason to divide up a scarce resource—the limited opportunities to study law at Michigan—among Caucasians and African Americans in a sanctioned way—in short, a reason of distributive justice. Do African-American applicants have a moral right to enjoy priority over Caucasian applicants? I am not sure. This seems to me to require a further argument. It is plausible to maintain that some reasons for action fall short of rights.

Such ordinary considerations of distributive justice enjoy absolutely no priority over welfare considerations. Suppose it turns out that the Michigan affirmative action plan harms Caucasians more than it helps African Americans. This would be a reason of welfare against it. It seems that we would have to weigh the reason to mete out distributive justice or equality against the reason to enhance social welfare. There is no a priori telling which reason should prevail. If the class of reasons that may bear on the choice of accident systems or rules includes all reasons of distributive justice, and I do not see why it should not, then my argument against the notion of justice as an absolute constraint on welfare enhancement is obviated. As such, distributive justice or equality imposes no constraint on welfare enhancement, absolute or not. It enjoys no lexical priority over welfare, simple or qualified.

Notice the interplay between Calabresi’s Both Justice and Welfare, on the one hand, and his Justice Before Welfare, on the other. In the context of accident law, the notion that justice is an absolute constraint leads to the automatic rejection of alternative accident law systems and rules simply on account of their relative injustice and irrespective of their relative welfare effects. To avoid this strange result, Calabresi tends to read his justice goal extremely narrowly. But first, this effectively empties Justice Before Welfare. Because typically none of the alternative law reforms on the discussion table include such
monstrous policies as the beheading of red light runners, none can be said to be preferable to any on grounds of justice.105

What is more important, such a narrow concept of justice also renders the best part of Calabresi’s position on the goals of accident law, namely Both Justice and Welfare, unassertable on grounds of triviality. Indeed, it effectively collapses Calabresi’s position on the normative goals of accident law into applied utilitarianism.106 But there is good news: once he scraps Justice Before Welfare, the pressure to give justice an excessively narrow interpretation disappears. Given our assessment of this thesis, this is what he should probably do anyway. This would be a price well worth paying for the warrant to assert Both Justice and Welfare.

X. CONCLUSION

In this Article, I have sought to provide a partial defense of Both Justice and Welfare: the claim that both justice and welfare are independently valuable goals that the law may appropriately pursue—a view that is attributable to Calabresi. This claim, which might be taken to represent an assumption of moderate or minimally pluralist versions of normative law and economics, implies that the goals of justice and welfare may come into conflict and so necessitate value tradeoffs and sacrifices. I have tried to repel one line of challenge to this view, namely that welfare is either not a distinct, intrinsically valuable goal at all, or else its value depends on justice in a way that renders conflicts between the two goals impossible. This, I have claimed, is a plausible way to read Dworkin’s celebrated and foundational critique of Calabresi, and of normative economic analysis generally.

I have argued that, so interpreted, Dworkin’s challenge does not succeed and that the considerations on which he relies in fact confirm that welfare is not only a distinct, intrinsically valuable goal, but is also independent of justice in a way that makes conflicts between the two goals entirely possible.

Dworkin’s original critique is based primarily on an example of forced transfer. I have claimed that the example can only discharge the claim that tradeoffs between justice and welfare are impossible if it can discharge the weaker claim that tradeoffs between justice and wealth are impossible. I then claimed that the example cannot possi-

106. Cf. supra note 11.
bly do so without begging the question. Moreover, I have claimed that the example does not even engage the claim that wealth is not a distinct, intrinsically valuable goal. I have then argued that when we modify the example to engage this claim, it tends to show that wealth, or something that may correspond to wealth, is in fact a distinct, intrinsically valuable goal that does not derive its value from justice. Since welfare fits the description best, this tends to show that welfare is a distinctly and intrinsically valuable goal.

This does not quite show that welfare is also valuable independently from—and might conflict with—justice. But I have argued that when we modify the forced-transfer example in the right direction, a conflictual intuition emerges. To the extent that you share this intuition, you have a reason to accept the tradeoffs view.

Dworkin's second, analogy-based argument for his critique aligns the distinction between a genuine value conflict and a merely apparent one with his heuristic distinction between a compromise and a recipe. He claims that the relation between justice and welfare answers to the concept of recipe rather than to that of compromise. I have argued that the distinction is vitiated by a critical equivocation and therefore cannot ground an argument. I have then argued that, even apart from this problem, it is hard to make good sense of the attempt to analogize the relation between justice and welfare to the relation between two cake ingredients (or between one ingredient and the cake as a whole). If anything, the analogy threatens self-defeat.

I have then considered Dworkin's more recent reflections on the subject, in which he concedes that welfare or well-being is a distinct, intrinsically valuable goal, but insists that justice is a condition of well-being and challenges the standard assumption that paying higher taxes in the interest of social distributive justice may well involve a genuine sacrifice on the part of the taxpayer. I have argued against the condition thesis and for the standard assumption. Dworkin's discussion fails to explain why we should not accept the more plausible view that justice may be one component of well-being among several, and not necessarily the most important one. In the end, Dworkin settles on a version of the condition thesis that is hard to distinguish from the view that justice may be a component of welfare, which he rejects. In any event, it is just too weak to challenge the standard assumption.

Finally, I have attended to Calabresi's Justice Before Welfare, the view that justice is an absolute constraint on welfare enhancement. I have argued that this view is unwarranted because some tradeoffs be-
tween justice and welfare in favor of the latter are, all things considered, morally permissible. What is more, ridding Calabresi of Justice Before Welfare would resolve a tension with another theme in his writing, namely the in-principle fungibility of everything. Most of all, the rejection of Calabresi's Justice Before Welfare is perhaps the strongest case for his Both Justice and Welfare.